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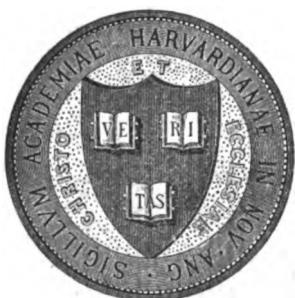
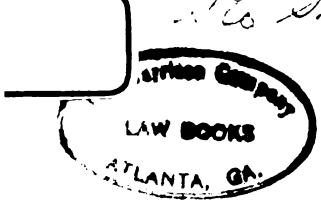


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BY
HARRY B. SKILLMAN

VOLUME IX
CIVIL CODE

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Of Domestic Relations.

CHAPTER 1.

Of Husband and Wife.

ARTICLE 1.

Of Marriage and Divorce.

SECTION 1.

Marriage, How and by Whom Contracted.

§ 2929. (§ 2410.) Restraints of marriage.

Deed: Under deed conveying land to wife for life and over for life to sister of grantor, and after her death to daughter, and, if she was married at sister's death, then equally to grant-

or's children, provision for estate to daughter was not void as being in restraint of marriage. 147/49, 50 (2) (92 S. E. 871)

§ 2930. (§ 2411.) Essentials of marriage.

1.

Previous marriage: Where woman having living husband married another man, second marriage was void. 146/367 (1) (91 S. E. 115).

Where second marriage by person is established and it is shown that he or she had previously married another person who was living at time of sec-

ond marriage, presumption is that first marriage had been dissolved by decree of divorce, and burden is upon person attacking validity of second marriage to show that divorce had not been granted. 24 App. 695 (2) (102 S. E. 35).

2.

Cohabitation: Mutual agreement to be husband and wife by parties able to contract, followed by cohabitation, is

recognized as valid marriage. 17 App. 263 (1) (86 S. E. 823).

General Note

Cited. 17 App. 431, 432 (87 S. E. 681).
Charge that if jury should find that plaintiff and intestate were living to-

gether prior to March 9th or on the 9th day of March, 1866, as husband and wife, that it would be immaterial

Of divorces, and how obtained.

that they were married by any form of law or not, and that law would not require that they should after that date enter into marriage ceremony or contract in order to constitute them husband and wife, was neither misleading nor harmful. 149/335 (100 S. E. 98).

Proof: Evidence here presented question for jury whether plaintiff was widow of decedent, notwithstanding

evidence of marriage of both parties after separation after ceremonial marriage. 145/363 (89 S. E. 325).

Whoever attacks validity of marriage has burden of proving its invalidity, by clear, distinct, and positive proof; presumption as to validity can only be negated by disproving every reasonable possibility. 24 App. 695 (1) (102 S. E. 35).

§ 2931. (§ 2412.) **Who is able to contract.**

General Note.

Cited. 17 App. 431, 432 (87 S. E. 681).

Age: Where marriage ceremony was performed between person under seventeen years of age and a woman, and he subsequently, before arriving at age of seventeen, filed libel for divorce in his pleading showing his age at time of marriage and at time of bringing suit which allegations were supported by uncontroverted evidence, and defendant filed answer and cross-petition, praying for permanent and temporary alimony, alleging acts of cruelty, court properly refused to grant alimony. 148/625 (97 S. E. 675).

Infant wife, of sufficient age to enter marriage contract, may maintain action to dissolve marriage relation,

and may, pending such suit, maintain action for alimony; and such case may proceed against husband while he is still a minor without appointment of guardian ad litem. 149/707 (1) (102 S. E. 21).

Ratification: Burden was on wife in action for death of husband less than 17 years old at their marriage to prove that husband ratified marriage after reaching age of 17. 16 App. 17, 18 (4) (84 S. E. 493).

Notwithstanding this section, where boy under 17 years of age marries and after reaching consentable age affirms marriage, and there is cohabitation, marriage is binding. *Id.*

§ 2935. (§ 2416.) **Void marriages.**

Affirmation: Notwithstanding this section, where boy under 17 years of age marries and after reaching consentable age affirms marriage, and there is cohabitation, marriage is binding. 16 App. 17, 18 (4) (84 S. E. 493).

Burden of proof: Burden was on wife in action for death of husband less than 17 years old at their marriage to prove that husband ratified mar-

riage after reaching age of 17. 16 App. 17, 18 (4) (84 S. E. 493)

Continued cohabitation: If man who had living wife undivorced entered into ceremonial marriage with another woman who was not shown to have known of former marriage, and they cohabitated as man and wife for many years, and continued so to do after death of first wife, they will be considered thereafter as lawfully married. 145/724 (1) (89 S. E. 815).

SECTION 2.

Of Divorces, and How Obtained.

§ 2944. (§ 2425.) **Total and partial, how granted.**

Charge: In absence of appropriate request, failure to explain the differ-

ence between total and partial divorce was not error, though the judge

Of divorces, and how obtained.

charged that the jury might grant either a total or a partial divorce. 141/404 (3) (81 S. E. 120).

Cohabitation: Where case has proceeded to second verdict finding total divorce and removing disabilities of both parties, and husband has re-

married and died, divorce verdicts will not be held void because of cohabitation of parties after first verdict, on collateral attack by son of deceased in administration proceedings. 144/359 (2) (87 S. E. 286).

§ 2945. (§ 2426.) Grounds for total divorce.

Cited. 148/640, 646 (98 S. E. 221).

7.

Amendment: Petition may be amended before the first verdict by adding a discretionary ground based on cruel treatment perpetrated before the suit was filed. 141/404 (1) (81 S. E. 120).

Evidence: Under evidence here in action based on desertion it was not error to grant nonsuit. 145/799 (89 S. E. 836).

Pleading: No cause for divorce was set forth in petition alleging that parties were married in 1889, that defendant was adjudged to be insane and was committed in 1898, that in Sep-

tember, 1889, defendant struck petitioner, inflicting serious wound, that from October 1, 1897, until May 1, 1898, defendant continued in constant state of quarreling and cruelly treating petitioner until such conduct became unbearable, and defendant, without cause on part of petitioner, left him and remained away until she became insane, that petitioner was without fault, that petitioner did not condone treatment of his wife. 149/508 (101 S. E. 183).

General Note.

Infant wife, of sufficient age to enter marriage contract, may maintain action to dissolve marriage contract, and may, pending such suit, maintain action for alimony; and such case may

proceed against husband while he is still a minor without appointment of guardian ad litem. 149/508 (1) (102 S. E. 21).

§ 2946. (§ 2427.) Discretionary grounds.

Amendable: Petition on ground of desertion may be amended before the first verdict by adding discretionary ground of cruel treatment perpetrated before suit was filed. 141/404 (1) (81 S. E. 120).

Cruel treatment: Where evidence did not demand a verdict granting total divorce, judge's discretion in granting a first new trial will not be disturbed. 141/407 (81 S. E. 128).

Where suit was predicated on cruel treatment, and there was evidence authorizing submission of that issue to jury, court should, even without request, charge as to discretionary power of jury to grant total or partial divorce if from evidence they should find for plaintiff. 145/822, 823 (4) (90 S. E. 73).

Where suit was predicated solely upon cruel treatment, error to instruct jury in regard to misrepresentations and fraud, inducing making of marriage contract. 145/822, 823 (3) (90 S. E. 73).

Where wife sued for divorce for cruel treatment, and this was denied by defendant, it was competent for defendant to introduce letters passing between him and his wife shortly after their separation, and pending alleged mistreatment, tending to rebut allegation of lack of affection on part of plaintiff and defendant toward each other. 145/822, 823 (5) (90 S. E. 73).

Libel for divorce brought by husband, based on cruel treatment, was

Of divorces, and how obtained.

sufficient here to withstand general demurrer. 145/886 (89 S. E. 1045).

Evidence that husband called his wife a "stinking lie" some three or four times in the presence of their daughter and a young man who was calling on the latter, and struck his wife in the face three times, and that he charged his wife with taking trips away from home to meet other men, authorized verdict granting total divorce to wife on grounds of cruelty. 146/164 (1) (91 S. E. 42).

Cruel treatment is willful infliction of pain, bodily or mental, upon complaining party, such as reasonably justifies apprehension of danger to life, limb, or health. 146/164, 165 (1) (91 S. E. 42); 148/159 (96 S. E. 174).

No cause for divorce was set forth in petition alleging that parties were married in 1889; that defendant was adjudged to be insane and was committed in 1898, that in September, 1889, defendant struck petitioner, inflicting serious wound, that from October 1, 1897, until May 1, 1898, defendant continued in constant state of

quarreling and cruelly treating petitioner until such conduct became unbearable, and defendant, without cause on part of petitioner, left him and remained away until she became insane, that petitioner was without fault, and that petitioner did not condone treatment of his wife. 149/508 (101 S. E. 183).

Evidence here failed to show case of cruel treatment which authorized grant of divorce on that ground. 149/506 (1) (101 S. E. 182).

Dishonesty on part of husband in his dealings with third party, not connected with domestic relations or treatment of his wife or grounds of cruelty alleged in her petition, is not matter to be brought to attention of jury. 145/822 (2) (90 S. E. 73).

Evidence in action brought on ground of cruelty that husband admitted having been guilty of dishonesty toward his former employer, and to have been discharged therefor, was incompetent. 145/822, 823 (2-a) (90 S. E. 73).

§ 2948. (§ 2429.) **Condonation, collusion, etc.**

Charge imposing on defendant burden of showing that his absence from plaintiff was by her consent and agreement erroneous. 140/170, 171 (5) (78 S. E. 833).

Intent with which wife wrote letter to husband requesting him not to attempt to see her not being shown, error to so charge jury as to make

intent a material fact in passing on whether absence of husband was with wife's consent. *Id.* 171 (6).

Jury question: Whether husband's remaining away from home was done with wife's consent not erroneously submitted to jury. 140/170, 171 (4) (78 S. E. 833).

§ 2951. (§ 2432.) **Proceedings.**

Cited. 148/640, 644 (98 S. E. 221).

Alimony: Where appearance by defendant in divorce and alimony proceeding at chambers hearings was in county other than that in which suit was brought, and was in obedience to rule nisi issued by judge, and not by virtue of the process, irregularity of such process was not before the court at such hearing. 148/151, 152 (2) (95 S. E. 972).

Fraud in setting up false ground of divorce held not to relieve plaintiff from imputation of negligence in failing to

defend divorce suit. 148/640 (98 S. E. 221).

Limitations: See § 4374, catchword **Divorce**.

Process: Where husband remarries and dies after divorce in suit by wife, divorce will not be declared void, on collateral attack by his son, because service on him was attempted by leaving copy of summons at wife's residence while he was in penitentiary in another county. 144/359 (1) (87 S. E. 286).

Of divorces, and how obtained.

§ 2952. (§ 2433.) Respondent may ask a divorce, when.

Cruelty: To libel for divorce on grounds of cruelty and habitual intoxication defendant may recriminate the adul-

tery of plaintiff. 140/802, 803 (79 S. E. 1124).

§ 2954. (§ 2435.) Schedule.

Definition: "Scheduled property," as used in section 2956, has reference to property scheduled in accordance with this section, and has reference only to property owned by defendant at time of filing libel for divorce. 146/606 (91 S. E. 688).

Dismissal: Not error to refuse, on oral motion in nature of general demurrer, to dismiss petition on ground that schedule of property not attached thereto. 140/170 (1) (78 S. E. 833).

§ 2956. (§ 2437.) Verdict of jury.

"Scheduled property" has reference to property scheduled in accordance with section 2954, and has reference only to property owned by defendant at time of filing libel for divorce. 146/606 (91 S. E. 688).

Verdict: Where property belonging to defendant at commencement of divorce suit against him was scheduled then or pending trial, jury, in passing on alimony, could in their verdict specify disposition to be made of property. 146/606 (91 S. E. 688).

§ 2958. (§ 2439.) Verdict for partial divorce.

Issues determined: Questions of disability of parties to remarry, custody of children, and question of alimony, if such questions be raised by plead-

ings and evidence, can not be determined on the first trial. 145/822 (1) 90 S. E. 73).

§ 2971. (§ 2452.) Custody of children.

Another State: One of parties to Texas divorce decree may, where they have removed to Georgia, show that provision that respondent was to have custody of child was procured through fraud. 143/816 (1) (85 S. E. 1045).

Nevada decree for divorce and alimony, awarding custody of child, will not be declared void in toto in action in Georgia, though at time of

rendition child resided in Georgia. 144/119 (1) (86 S. E. 224).

Construction: This section and section 2980, being in pari materia, must be construed together. 140/479 (79 S. E. 115).

Discretion: Award of custody of children to plaintiff, on conflicting evidence, was not abuse of discretion. 146/362 (91 S. E. 120).

§ 2972. (§ 2453.) Habeas corpus for wife or child.

Affidavits: Where affidavits are permitted to be used in habeas corpus proceedings for possession of child, they should be executed at least with same formality as is required at interlocutory hearings for injunction; in such cases affidavits which do not upon face of paper, describe case in which they are intended to be used are not admissible in evidence. 146/594, 596 (3) (91 S. E. 775).

Discretion conferred on courts by this section, in determining habeas corpus proceedings for detention of child, applies to ordinary. 141/535 (2) (81 S. E. 433).

Where evidence in habeas corpus on the controlling issue was conflicting, discretion of court in awarding minor child to applicant will not be disturbed. 149/333 (100 S. E. 97).

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Evidence: Where writ of habeas corpus is used to determine custody of infant, better practice is to hear evidence viva voce, or taken by deposition or interrogatories, after notice and with opportunity for cross examination; but this is not absolute and inflexible rule. 146/594, 596 (3) (91 S. E. 775).
See **Affidavits**.

Final: Decree awarding child to one parent is not conclusive in habeas corpus proceedings involving conditions or unfitness of the parent arising since the decree. 141/535 (1) (81 S. E. 433).

Judgment of court of ordinary in habeas corpus proceeding, until reversed or set aside, was conclusive on question of gift of child to respondents, and upon their right as against plaintiff to its possession, and as to their fitness to have possession of the child. 146/594, 595 (2) (91 S. E. 775).

Fitness: Decree awarding custody of child is not conclusive in habeas corpus proceedings as to rights of spouses where circumstances pertaining to fitness of parent to whom child was awarded, arising after decree, are involved. 143/816 (4) (85 S. E. 1045).

Gift: Where evidence in proceeding by father to recover two-year-old child from maternal grandmother was conflicting as to whether there had been a gift to the grandmother, not abuse of discretion to award custody to her. 142/636 (83 S. E. 520).

Mother: Under evidence in habeas corpus proceedings by father against mother to obtain possession of child, whose custody had been awarded to

him by divorce decree, not abuse of discretion to award child to mother. 141/535 (3) (81 S. E. 433).

Petition for habeas corpus for custody of child, alleging plaintiff's divorce from defendant and award of child to her, its subsequent award to her on habeas corpus, its seizure by defendant, and his marriage to woman alleged to be cruel to children, set forth cause of action. 148/631 (97 S. E. 669).

Relinquished: Where petition for habeas corpus was brought against father of child nine years old, to secure possession of child, and it was alleged that defendant relinquished claim and had given child to petitioner, and that for four years prior to bringing of petition petitioner had had absolute custody of the child, but that defendant, without legal authority, had taken possession of child, and where court overruled general demurrer, exception to judgment, based upon ground that petition did not show sufficient consideration for alleged contract, was without merit. 149/122 (1) (99 S. E. 292).

Services: Petition here in action by plaintiffs for value of services to child recovered from them by defendant, the child's father, in habeas corpus proceeding, was demurrable. 143/526 (85 S. E. 698).

Writ of error: Where, in habeas corpus for possession of child, judgment overruled plea in bar and at least temporarily deprived respondents of possession, and gave child to opposite party, writ of error was not premature. 146/594, 595 (1) (91 S. E. 775).

SECTION 3.

Of Alimony.

§ 2975. (§ 2456.) **Permanent and temporary.**

Administrator: Where wife suing for divorce was awarded alimony for two years and died within such time, her administrator could not recover bal-

ance of alimony, which is for support of wife during life. 147/681 (95 S. E. 214).

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§ 2976. (§ 2457.) **Proceedings to obtain.**

Cited. 143/314, 316 (85 S. E. 193).

Abatement: On hearing of application for temporary alimony in vacation before term of court to which suit is returnable has arrived, error to pass order striking plea in abatement. 145/111 (2) (88 S. E. 584).

Adultery: Evidence of adultery by wife was not admissible on hearing of application for temporary alimony where husband sued on ground of adultery, and defendant, in cross-action, prayed for divorce on ground of cruelty. 145/32 (88 S. E. 561).

Collateral attack: It is incompetent, on issue formed on illegality to execution issued on judgment in application for temporary alimony, based on pending libel for divorce, to collaterally impeach it by parol proof that another and different judgment was rendered when alimony case was heard. 146/61 (90 S. E. 379).

Consent: Under this section, and in view of section 2986, consent order allowing wife temporary alimony in action for permanent and temporary alimony was not supplanted by decree of divorce in favor of husband, it not appearing that in divorce suit any application was made for alimony. 144/20 (2) (85 S. E. 1041).

Construction of decree: Decree awarding sum for support of wife and daughter, pending action, not construed as awarding half in severalty to each. 140/76 (78 S. E. 408).

Contempt: Judgment adjudging defendant to be in contempt for failure to pay temporary alimony and attorney's fees was error, where evidence showing inability of husband to comply with judgment awarding the alimony and attorney's fees was not contradicted. 149/213 (99 S. E. 611).

Dismissed: Where parties resumed cohabitation and desired dismissal of suit, attorneys for wife could not intervene or have judgment in the proceeding for their fees, but order of dismissal was proper. 140/18 (1) (78 S. E. 462); 144/294 (87 S. E. 27).

Evidence of acts and sayings of son-in-law of husband who was joined as defendant in suit for alimony, tending

to disprove his answer and support plaintiff's allegations as to threats and fraudulent transfers, was competent. 144/194 (1) (86 S. E. 548).

Court did not abuse discretion in refusing to admit in evidence affidavit offered by attorney for one party, which had not been served on opposite party in accordance with order of court relating to exchange of affidavits. 146/371 (1) (91 S. E. 114).

On trial of suit for permanent alimony and to cancel deed by defendant to daughter by former marriage, it was not error to admit plaintiff's testimony that defendant had not paid money previously ordered to be paid. 147/311 (4) (93 S. E. 875).

Expenses of litigation: Allowance of temporary alimony, including counsel fees, discretionary. 140/18, 22 (78 S. E. 462).

Temporary alimony is awarded to afford wife means of contesting all issues between herself and her husband, and a plea to the jurisdiction is one of the issues raised. 148/196, 197 (3) (96 S. E. 211).

Under evidence here, court did not abuse his discretion in awarding \$3,000 for counsel fees in suit for alimony. 149/467 (100 S. E. 571).

Impotency of the wife is not ground of defense by husband to suit by wife to recover permanent alimony. 147/311, 312 (5) (93 S. E. 875).

Infant wife, of sufficient age to enter marriage contract, may maintain action to dissolve marriage contract, and may, pending such suit, maintain action for alimony; and such case may proceed against husband while he is still a minor without appointment of guardian ad litem. 149/707 (1) (102 S. E. 21).

Insane wife: Action for alimony can not be maintained in her own name by wife while on furlough from State Sanitarium, but still insane. 145/111 (1) (88 S. E. 584).

Judgment: When application for temporary alimony, based on pending libel for divorce, was heard anterior to second verdict in divorce case, and judgment was reserved, such judgment is

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not void though written out and filed next day after last verdict was rendered. 146/61 (90 S. E. 379).

Jurisdiction: Where husband left county while suit was pending for alimony, leaving crops and taking none of his personal effects, and during absence did no affirmative act expressive of an intention to change his residence to another county, finding that he had not changed his residence and was subject to jurisdiction of court was sustained. 145/101 (1) (88 S. E. 676).

Where court was without jurisdiction to grant temporary alimony, question of jurisdiction may be raised for first time by excepting to judgment. 146/112 (90 S. E. 862).

Marriage: Where there was no valid marriage because of one party being under the statutory age, alimony could not be allowed in suit for divorce. 148/625 (97 S. E. 675).

Money: Applications for alimony dissimilar from ordinary suits for money. 140/18, 25 (78 S. E. 462).

Non-resident: Foreign decree for alimony rendered in stale action and on service on defendant's attorney only, defendant having become resident of Georgia, was void and unenforceable. 142/441 (83 S. E. 208).

Pending: Petition merely for temporary alimony did not, in view of this section and section 2986, give court jurisdiction at chambers, in absence of showing that suit for divorce or permanent alimony was pending. 144/423 (87 S. E. 391).

Where rule nisi against defendant, requiring him to show why temporary alimony should not be granted, was issued pending suit for divorce, motion to dismiss case on ground that plaintiff must file separate and auxiliary proceeding, in order to secure temporary alimony, was properly overruled. 146/67 (90 S. E. 381).

Application for temporary alimony must be based on pending suit for divorce or for permanent alimony. 146/112 (90 S. E. 862).

Where husband files suit for divorce, and wife, while suit is pending, files petition in same court, to a regular term, for permanent and tem-

porary alimony, pendency of divorce suit can not be successfully pleaded as bar to award of temporary alimony. 149/517 (1) (101 S. E. 114).

Where petition for permanent and temporary alimony makes reference to pending divorce suit filed by husband, there is simultaneously pending in same court both a divorce proceeding and an application for permanent and temporary alimony, either one of which is a basis of jurisdiction for judgment awarding temporary alimony. 149/517 (2) (101 S. E. 114).

Petition praying temporary and permanent alimony need not allege that husband has income from which alimony can be paid. 148/196, 197 (2) (96 S. E. 211).

Receivers: Fact that wife petitioned for appointment of receiver to hold husband's property and that temporary receiver was appointed, did not authorize her attorneys to intervene and have judgment for their fees where the parties had resumed cohabitation and desired dismissal of the suit. 140/18 (2) (78 S. E. 462).

Separation: Judge may allow temporary alimony from date of separation to filing of action for divorce. 148/590, 591 (2) (97 S. E. 539).

Termination of litigation: Judgment granting temporary alimony in stated monthly payments "until further order of the court" is not illegal because not limited to termination of suit, since necessary construction and effect of such judgment is that payments continue, under supervisory power of court to modify or revoke, until final judgment, when payments cease altogether by operation of law. 146/344 (91 S. E. 61).

Judge could not legally order payment of temporary alimony beyond termination of action for divorce, and therefore should not order its payment "until the further order of the court." 148/590, 591 (3) (97 S. E. 539).

Total divorce: After wife obtains decree of total divorce marital relation no longer exists, and she can not thereafter maintain action for alimony. 24 App. 512 (1) (101 S. E. 315).

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§ 2977. (§ 2458.) Discretion of judge.

Stated. 140/18, 22 (78 S. E. 462).

Abuse: Order here allowing temporary alimony and counsel fees and preserving status was not abuse of discretion. 144/194 (2) (86 S. E. 548).

Where husband provided everything he could for wife, and was not guilty of cruel treatment, and wife refused to live with him because of mutual antipathy between him and his wife's mother, and because she no longer loved him, granting of temporary alimony was abuse of discretion, no divorce suit pending. 145/56 (88 S. E. 566).

Grant or refusal of temporary alimony, and amount thereof where allowed, rest in sound discretion of court, which discretion will not be interfered with in absence of abuse. 146/48 (90 S. E. 381).

Evidence: That court required defendant husband in proceeding for temporary alimony to state upon cross-examination, in answer to question propounded by plaintiff's counsel, what he would take for tract of land of which he was the owner, was not such error as will require grant of new trial, though proper measure of value was true market value of land in question. 149/44 (2) (99 S. E. 37).

Excessive: An award to plaintiff of \$30.00 counsel fees, \$75.00 cash, and

\$30.00 per month as temporary alimony held under facts here to be an abuse of discretion. 141/158 (4) (80 S. E. 652).

Evidence here was sufficient to support judgment allowing \$15.00 per month temporary alimony for support of wife and three children, and \$25.00 for counsel fees. 148/509 (97 S. E. 68).

Process: Where there is suit for temporary and permanent alimony, service may be effected by leaving copy of petition and process, as in other cases at law or in equity, at residence of defendant. 147/391, 392 (1) (94 S. E. 234).

Total divorce: Where total divorce has been granted a wife can not then obtain an order or judgment requiring her former husband to pay alimony. 141/361 (1) (80 S. E. 992).

Petition here held to seek recovery of alimony after divorce, and hence it was demurrable. Id. 361 (3).

Allegations that father frequently visited mother's home and was abusive in his conduct, and praying that the court as a part of the decree, limit the father's right with respect to visiting the children, did not support the petition as against demurrer. Id. 361, 362 (4).

§ 2978. (§ 2459.) Revision and enforcement.

Adultery: Respondent in proceeding to punish for contempt of court in failing to pay permanent alimony could not go behind judgment and set up adultery of the woman, to defeat the alimony. 146/382 (3) (91 S. E. 415).

Amendment to defendant's answer in action on Nevada decree for divorce and alimony, seeking to set up as defense against recovery of alimony that child whose custody was awarded by decree resided in Georgia at time of its rendition, properly disallowed. 144/119 (1) (86 S. E. 224).

Attachment: See § 4643, catchword **Alimony**.

Consent: Where wife's suit for alimony had never been finally disposed of

and consent order had not been modified by proper proceedings in suit wherein it was granted, independent petition, after husband obtained divorce, in which there was no provision for alimony to revoke the order, will be denied. 144/20, 21 (4) (85 S. E. 1041).

Contempt: Failure to pay permanent alimony as provided in final decree granting same may be punished as for contempt of court. 146/382 (2) (91 S. E. 415).

Where order is granted upon petition for temporary alimony, filed pending divorce suit, for payment in monthly installments of certain designated sums as temporary alimony, and husband

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fails to pay for several months preceding decree granting total divorce, court having jurisdiction of case has authority, in contempt proceedings, to enforce payment of installments which defendant had failed to pay. 147/433 (94 S. E. 555).

Decree: After termination of suit for permanent alimony and rendition of final decree therein, not excepted to, decree allowing alimony passes beyond discretionary control of trial judge, and he has then no authority either to abrogate it or modify its terms, unless power to do so is reserved in the decree. 146/382 (1) (91 S. E. 415).

Evidence: In action on Nevada decree for divorce and alimony, decree was admissible in evidence. 144/119 (2) (86 S. E. 224).

Where only issue in proceeding for contempt because of failure to pay temporary alimony is one of fact, judgment of trial court will not be controlled by Supreme Court unless it appears that there is no evidence to

support finding. 147/503 (94 S. E. 885).

Execution: Order against husband, on application of wife, allowing temporary alimony, may be enforced either by writ of fieri facias or by attachment for contempt against person of husband. 148/506 (1) (97 S. E. 65).

Ground: It is not error to dismiss on general demurrer motion to set aside judgment allowing temporary alimony, where motion is based on grounds existing at time of allowance of alimony, unless movant shows that without lack of diligence he was ignorant of such grounds at time of trial. 146/766 (1) (92 S. E. 519).

Permanent alimony: Verdict for permanent alimony based upon unauthorized grant of total divorce between the parties will be set aside, without prejudice to the right of the plaintiff, while living in bona fide state of separation, to prosecute her suit for permanent alimony. 149/506 (2) (101 S. E. 182).

§ 2979. (§ 2460.) Merits not in issue.

Stated. 140/18, 22 (78 S. E. 462).

Applied. 147/771 (95 S. E. 676).

Discretion: While evidence as to conduct of wife and her financial condition would have authorized court to refuse temporary alimony and attorney's fees, yet where husband produced no evidence to contradict charge, and there was some conflict as to conduct of wife, discretion in awarding her alimony and attorney's fees will not be disturbed. 141/791 (82 S. E. 226).

Provision in order granting temporary alimony that if defendant would provide reasonable separate home for his wife and child, and offer in good faith to support them, he would be relieved from alimony, was not abuse of discretion. 143/286 (2) (84 S. E. 581).

Allowance of temporary alimony on conflicting evidence held not abuse of discretion. 146/362 (91 S. E. 120).

Upon conflicting evidence discretion of trial judge in awarding temporary alimony and counsel fees will not be controlled where abuse is not shown. 148/151, 152 (3) (95 S. E. 972).

Supreme Court will not control discretion of trial court in allowing temporary alimony, unless it has been flagrantly abused. 149/44 (1) (99 S. E. 37).

Modify: Where defendant had entirely failed to pay attorney's fees and temporary alimony, and there was evidence to show that he could have complied with judgment, no abuse of discretion to refuse to modify order for payment of alimony and attorney's fees. 145/714 (1) (89 S. E. 762).

Where wife was awarded monthly temporary alimony she is not entitled to installments of temporary alimony which accrued and became due after final decree of divorce between the parties. 145/714 (2) (89 S. E. 762).

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§ 2980. (§ 2461.) Support and custody of children pending suits for divorce.

Construction: This section and section 2971, being in *pari materia*, must be construed together. 140/479 (79 S. E. E. 115).

Decree awarding sum for support of wife and daughter, pending action, not construed as awarding half in severalty to each. 140/76 (78 S. E. 408).

Habeas corpus: In determining custody of children judge is not bound by previous judgment in habeas corpus between the same parties, but, after hearing all the facts and circumstances, should exercise a sound discretion in awarding custody. 140/479 (79 S. E. 115).

§ 2981. (§ 2462.) Alimony for children on final trial.

Education: Verdict awarding specified sum per month to be paid to clerk of court, not for support of minor child, but to be used solely for his education, is contrary to law and evidence in the case, and new trial should be granted. 149/693 (2) (101 S. E. 806).

Total divorce: A wife, to whom total divorce has been granted, can not in her own name, and in behalf of a minor child, obtain an order or judgment requiring her former husband to pay alimony, in order that she may support the child, whose custody has been awarded to her. 141/361 (2) (80 S. E. 992).

Jury on second or final verdict in trial of suit for divorce and alimony may find what amount minor child or

children shall be entitled to for their permanent support. 149/693 (2) (101 S. E. 806).

Wife: After rendition of decree of divorce for wife, based on misconduct of husband, in which decree the custody of the children is awarded to the wife but no provision for their support is made, the father is not relieved from his legal obligation to support the children. 141/361 (2-a, b) (80 S. E. 992).

Where former decree for alimony provided for support of minor child, wife could not maintain original action at law to recover necessary expenditures made by her, after such decree, for support of child. 24 App. 512 (2) (101 S. E. 315).

§ 2983. (§ 2464.) Permanent alimony, when granted.

Cited. 143/314, 316 (85 S. E. 193).

Charge: Where defendant wife answered, seeking permanent alimony, and her conduct as shown would not ordinarily preclude its recovery, failure to charge on the law applicable to permanent alimony was error. 141/404 (2) (81 S. E. 120).

Charge that if wife voluntarily leaves husband without sufficient cause, and he is willing to take her back and support her, jury could, if they thought proper, find no alimony for her, was not error. 144/312 (1) (87 S. E. 17).

§ 2984. (§ 2465.) Husband's voluntary deed.

Election: Where wife accepted payment of alimony as ordered in judgment; which was different from contract for alimony, she elected to

abandon contract, and neither she nor her executrix could thereafter enforce it. 144/18 (1) (85 S. E. 1016).

§ 2986. (§ 2467.) Proceeding for alimony before the judge.

Children: Right of children to be supported by their father was not concluded by consent decree rendered in alimony proceedings between father

and mother. 141/523, 524 (1) (81 S. E. 441).

Consent: Under section 2976, and in view of this section, consent order

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allowing wife temporary alimony in action for permanent and temporary alimony was not supplanted by decree of divorce in favor of husband, it not appearing that in divorce suit any application was made for alimony. 144/20 (2) (85 S. E. 1041).

Excessive: Not abuse of discretion here to order husband to pay wife \$25 per month for children's support, with attorney fees. 141/523, 524 (2) (81 S. E. 441).

Jury: Though judge, in proceeding for alimony, left the entire question of alimony to a jury, it was competent for him to reopen the question and change his judgment and allow alimony, it appearing that wife had become physically incapacitated and unable to provide for herself and children. 140/363 (78 S. E. 1078).

§ 2987. (§ 2468.) **Bill of exceptions and proceedings thereon.**

Discretion: Where, pending suit for permanent alimony, there was hearing at chambers on wife's application for temporary alimony and attorney's fees, and upon such hearing evidence was conflicting, discretion of trial court in award of temporary alimony together with counsel fees will not be controlled where it is not made to appear that

the discretion was abused. 148/151 (95 S. E. 961).

Evidence: Exceptions to judgment of court allowing temporary alimony and attorney's fees raised no other question than that as to whether evidence authorized granting of alimony and whether amount awarded was excessive. 148/109 (95 S. E. 974).

§ 2988. (§ 2469.) **Liability to third person before, etc.**

Administrator: Where wife suing for divorce was awarded alimony for two years and died within such time her administrator could not recover bal-

ance of alimony, which is for support of wife during life. 147/681 (95 S. E. 214).

§ 2989. (§ 2470.) **After alimony granted.**

Administrator: Where wife suing for divorce was awarded alimony for two years and died within such time, her administrator could not recover bal-

ance of alimony, which is for support of wife during life. 147/681 (95 S. E. 214).

§ 2990. (§ 2471.) **Subsequent cohabitations.**

Contract: Husband was estopped to maintain suit to cancel contract made with wife, while living in bona fide state of separation, conveying certain property, on ground of fraud, and subsequent cohabitation, which agreement was to be valid in case of final divorce, there being verdict and decree granting final divorce but decree not referring to

alimony or such contract. 149/803 (102 S. E. 348).

Deed providing that title should revert to grantor after three years if he complied with certain conditions, otherwise title to vest in his wife, did not come within this section, and hence subsequent cohabitation did not ipso facto destroy the deed. 141/448 (1-b) (81 S. E. 118).

Of the rights and liabilities of husband and wife.

ARTICLE 2.

Of the Rights and Liabilities of Husband and Wife.

§ 2992. (§ 2473.) Husband is head of family.

Common-law rule as to rights and liabilities of husband and wife is in force in this State except where changed by the statute law. 20 App. 393 (1) (93 S. E. 42).

At common law husband and wife are one person in law, and wife's legal existence is suspended during the marriage and consolidated into that of the husband. 20 App. 393 (1) (93 S. E. 42).

House: Husband is recognized by law as head of his family, and, where he and his wife reside together, the legal presumption is always that the house and all the household effects belong to the husband as the head of the family; this

presumption may be rebutted. 23 App. 111 (2) (95 S. E. 478).

Where there was evidence that defendant, who was charged with manufacturing intoxicating liquors, made direct confession that she had been making the same, which confession the jury found to be true, it was immaterial whether house and household effects, including liquor itself, belonged to her or to her husband, and error in charge that as general rule, where husband and wife live together, whatever is found at place where they live is presumed to be that of the husband, did not require new trial. 22 App. 111 (2) (95 S. E. 478).

§ 2993. (§ 2474.) Wife's property, when separate.

Stated. 140/554, 565 (79 S. E. 546).

Agent: Where there was evidence that plaintiff's husband was her agent to collect money, not error to charge that if he was authorized to collect the same, payment to him would be payment to the wife. 142/254 (2) (82 S. E. 663).

Evidence here in action for specific performance of bond for title authorized charge on agency of husband for wife in surrendering such bond. 145/252, 253 (2) (88 S. E. 974).

There being no sufficient evidence of agency of plaintiff's husband, or ratification of act of husband in executing mortgage, it was erroneous to admit evidence thereof. *Id.* 252, 254 (5).

Where in action for price of fertilizer it appeared that fertilizer was delivered to defendant's husband, and evidence was insufficient to show agency, verdict for plaintiff was unauthorized. 145/689 (1) (89 S. E. 745).

Where in action for price of fertilizer delivered to defendant's husband the question was whether or not defendant's husband was her agent, it was erroneous to submit question whether plaintiff had reasonable

grounds to believe that defendant's husband was acting as her agent for her. 145/689 (2) (89 S. E. 745).

It was question of fact for jury under evidence here whether defendant's husband was her agent and acting within scope of authority in transferring note sued on to plaintiff, and whether defendant ratified transfer as made, and direction of verdict in favor of defendant was error. 148/487 (2) (97 S. E. 69).

Where evidence did not disclose that husband of defendant was authorized to make in her behalf contract sued upon, but, to contrary, tended to show that alleged agent was acting in his individual capacity, and it did not appear that there was such subsequent ratification as would bind defendant, trial court did not err in awarding nonsuit. 18 App. 35 (88 S. E. 751).

Fact that husband cultivates his wife's lands does not raise presumption of law or of fact that he is her agent. 18 App. 528 (1) (89 S. E. 1053).

Where there was no evidence of direct sale to defendant herself, and none from which it could be legitimately inferred that her husband, who made the purchase, was actually acting as her agent or that she received

Of the rights and liabilities of husband and wife.

benefit of fertilizer sold to him, court did not err in awarding nonsuit. 18 App. 528, 529 (2) (89 S. E. 1053).

Mere fact that wife may be owner of one or more cows which feed upon provender furnished solely upon credit of husband will not render her liable for value of such foodstuff, nor authorize judgment against her for same, on theory that she was concealed principal of her husband, when there is no evidence that he was in any way acting as her agent when purchase was made. 24 App. 296 (1) (100 S. E. 647).

Bankrupt: Where wife of Georgia bankrupt was designated as beneficiary in policies upon his life, in view of this section, bankrupt's trustee could not claim cash value of such policies as against wife. 230 Fed. 733 (3); s. c. 37 A. B. Rep. 189).

Consent: In proceeding under execution with claim to goods levied on by wife of defendant in f. fa., charge that, if it was claimant's property fact that it had been handled by her husband with her permission would not destroy her right to property was not error. 24 App. 292 (1) (100 S. E. 726).

Contract between husband and wife who are living in state of separation, in settlement of disputed claims over property, is not without consideration and is binding on parties. 148/250, 251 (1) (96 S. E. 340).

Earnings: Since Act of 1866, husband may, by consent or agreement with his wife, allow her to engage in independent business and keep her earnings as her separate estate, but in absence of such agreement, either express or implied, wife's earnings belong to husband. 141/534 (1) (81 S. E. 879).

Charge as to right of husband or wife to wife's separate earnings was properly given in equitable action by administrator of married woman against her surviving husband and one who had given husband bond for title and from whom husband claimed right to deed, where evidence showed that part of payments made on bond for title were moneys earned by wife. 141/534 (2) (81 S. E. 879).

Plaintiff having alleged that she was allowed by her husband to receive proceeds of her labor, and that she was independent of her husband, charge that plaintiff alleged that she enjoyed the proceeds of her own labor, which she lost for three months on account of her injury, was not error. 142/182 (1) (82 S. E. 542).

There being evidence justifying verdict for loss of time without finding that plaintiff was liable for medical services, error to charge that she also sued for medical services, and that jury could find such amount as would compensate therefor. Id. 182 (2).

Charge in action by wife for personal injuries as to amount of damages recoverable for her diminished capacity to discharge her ordinary daily duties was erroneous, as her husband was entitled to her services. 13 App. 777 (3) (79 S. E. 1129).

In absence of consent or agreement to contrary, express or implied, earnings of wife belong to husband. 148/25, 27 (3) (95 S. E. 673).

Wife is entitled to her earnings when her husband consents that she shall receive them. 20 App. 393 (1) (93 S. E. 42).

Equitable Lien: Where a married woman and her husband purchase land, and receive bond for title, and she pays part of the price, and her husband, without her consent, obtains a deed, and conveys the land to a person who takes with full knowledge of the facts, the wife is not entitled to an equitable lien upon the land for the money so paid by her. 141/114 (1) (80 S. E. 625).

Evidence: Before deed executed in 1848 to married woman was admissible as basis for recovery by her administrator in 1911, after her death in 1879, there should have been evidence that her husband's marital rights did not attach. 143/7 (2) (84 S. E. 58).

Gifts: If husband buys land and causes deed to his wife to be executed by vendor, such conveyance will amount to gift of land by husband to wife, and will operate to vest title in her. 147/37 (1) (92 S. E. 863).

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Guaranty: At common law, a married woman's contract of guaranty did not bind her. 21 App. 194, 197 (94 S. E. 83).

Knowledge: Where there was evidence that hogs were property of wife, and that without her knowledge or consent they were surrendered to defendant by her husband in extinguishment of a debt of the latter, court did not err in charging jury that wife would not be bound by any trade of her husband made without her knowledge. 21 App. 399 (2) (94 S. E. 632).

Money: Loan of money by wife to husband creates as between them relation of debtor and creditor, and this relation is not changed into that of trustee and cestui que trust in consequence of promise of husband, at time loan is made, that he will invest money in particular property for benefit of wife. 148/429 (3) (96 S. E. 867).

Payment: Check originally payable to married woman or order, and indorsed in blank by her, appearing to have been cashed by bank and proceeds paid to husband and deposited to account standing in his name in such bank, and on which draft was drawn by him, applying fund in payment of his own obligation to bank, and it being possible, under the evidence, for jury to have found that bank did not know or have reasonable cause to believe that payment so made by husband was with property of wife, the wife is bound by the payment so made. 20 App. 219, 220 (2) (92 S. E. 964).

Prior to Act of 1866: Prior to enactment of married woman's act, property given wife during coverture vested in her husband, unless gift used words indicating wish for personal enjoyment by the wife. 143/607 (1) (85 S. E. 852).

Under law existing in 1859, where married woman received gift of money, and donor employed language showing intention that it should be for her separate use, and after receiving money wife turned it over to husband, who by

investment mingled it with his individual estate, property became separate estate for use of wife with legal title vested in husband under implied trust. 147/235 (1) (93 S. E. 411).

Prior to Act of 1866, wife's share of her deceased father's estate, who died intestate, having been reduced to husband's possession, passed to and vested in her husband; and this was so as to her share in realty as well as personalty, by the Acts of 1789, she having married since February 22, 1785. 147/601, 602 (9) (95 S. E. 13).

Receipt given by husband in 1861 and duly attested, fully acquitting administrator for distributive share of wife in estate of her father, who died intestate in 1857, and without objection admitted to record by ordinary in 1863 as return of administrator, was properly admitted in evidence over objection that authority of husband to execute receipt had not been shown. 147/601, 602 (10) (95 S. E. 1013).

Suits: Where landlord rented premises to a husband as a family residence, wife could recover in her own right for damage to her separate property in consequence of defective condition of roof, it appearing that the landlord had been notified of the defect. 18 App. 533 (89 S. E. 1048).

Surety: Wife as surety for husband or other persons: See § 3007 and notes.

Torts to wife, recovery for: See § 2994 and notes.

Trust: Passage of married woman's act of 1866 caused executory trust created by deed to become executed if grantee were married and over age of minority. 144/115 (1) (86 S. E. 235).

Trust to married woman for life, with remainder to her surviving children, became executed immediately upon delivery of deed, but did not extinguish power of sale conferred on trustee, when empowered by wife, of selling life estate. 147/5, 6 (2) (92 S. E. 514).

§ 2994. (§ 2475.) Torts to wife.

Earnings: Marriage of woman after receiving injury in railroad wreck does

not divest her of right to recover damages for total or partial loss of her

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earning capacity. 19 App. 503 (91 S. E. 1045).

Living with husband: Wife can not recover of husband, with whom she is living in lawful wedlock, for tort re-

sulting from his negligent operation of automobile in which they were riding at time of injury. 19 App. 634 (1) (92 S. E. 25).

§ 2996. (§ 2477.) **Agency of wife in respect to necessities.**

Cohabitation and joint use of goods purchased is presumptive evidence of wife's authority to contract, and it is for husband to rebut presumption by showing that goods were supplied under such circumstances that he is not bound to pay for them; such presumption can only be rebutted by unequivocal evidence that articles furnished were not necessities, or that seller had either actual or constructive notice of allowance to wife by husband, either permanent or temporary, sufficient to enable her to procure necessities without obtaining them upon her husband's credit. 24 App. 106, 107 (2) (100 S. E. 43).

Jury: Whether credit was extended to husband or to wife, and whether parties were living in state of separation as husband and wife under circumstances as would make him liable for necessities furnished her, were questions for jury in action brought by physician against husband for medical services rendered wife. 23 App. 479, 480 (4) (98 S. E. 405).

Necessaries: Where plaintiff introduced positive evidence that articles pur-

chased by wife were necessities, and only contradictory evidence was mere opinion, and there was no evidence that plaintiff had notice that husband had furnished wife with money at time of purchases, verdict for defendant was unauthorized. 15 App. 139, 140 (2) (82 S. E. 783).

Presumption: Presumed consent of husband to wife purchasing necessities can only be rebutted by positive evidence that articles furnished were not necessities or that seller had notice of sufficient allowance to wife by husband. 15 App. 139 (1) (82 S. E. 783).

Where necessities are furnished to wife in absence of any express agreement by her to be liable therefor, presumption is that she contracted for them in the right of her general agency for her husband, and that he, and not she, is liable; this is true though creditor may have himself intended to credit wife and not husband, unless it be that such intention was expressly declared or communicated to wife. 24 App. 484 (101 S. E. 130).

§ 2997. (§ 2478.) **Liability of husband for necessities.**

Cited. 143/314, 316 (85 S. E. 193).

Jury: Whether credit was extended to husband or to wife, and whether parties were living in state of separation as husband and wife under such circumstances as would make him liable for necessities furnished her, were questions for jury in action brought by physician against husband for medical services rendered wife. 23 App. 479, 480 (4) (98 S. E. 405).

Separate: Evidence in action against husband for medical services rendered to

his wife that before date of rendition of services defendant left State as fugitive from justice, carried his wife with him, and that she later returned, husband still remaining away, did not necessarily demand inference that parties were living in state of separation as husband and wife under such circumstances that husband would not be liable for necessities such as medical services furnished to wife. 23 App. 479, 480 (2) (98 S. E. 405).

§ 2998. (§ 2479.) **General agency of wife.**

Evidence: Testimony of manager of plaintiff company that he had defend-

ant's wife execute in defendant's name a contract to pay for goods she had se-

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lected in weekly installments, and testimony of defendant that he had not authorized or ratified signing of contract, had bought no goods, and had

never promised to pay for same, etc., demanded verdict for defendant. 20 App. 666 (93 S. E. 255).

ARTICLE 3.

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§ 3007. (§ 2488.) **Wife feme sole as to her separate estate.**

Stated. 140/554, 565 (79 S. E. 546); 142/254 (1) (82 S. E. 663).

Accommodation note: Person contracting with payee of accommodation note executed by married woman that with it as security he will endorse note for payee, with full knowledge of all the facts, can not recover. 142/663 (1) (83 S. E. 526).

Agent: Where it did not appear that husband was wife's agent or that she bought goods which formed basis for consideration of note sued on, finding that she signed merely as surety for husband's debt was demanded. 17 App. 107 (86 S. E. 397).

Benefit: Mere fact that wife received benefit of goods bought by her husband on his own credit would not make her liable in law to seller for price of goods. 21 App. 583 (94 S. E. 839).

Borrowing: Married woman may borrow money and give it to her husband to apply on his debts, provided lender receives no part of it as husband's creditor. 14 App. 299 (1) (80 S. E. 697).

Wife may borrow money and give it to her husband, although lender knows that husband is to have use of same, but if lender is husband's creditor and makes loan to wife to pay husband's debt to him, transaction falls within this section. 145/815 (89 S. E. 1086).

Where creditor, at time debt is created, intends in good faith to extend credit to wife, and consideration of loan passes legally and morally to wife, and where writings then executed are such as purport to bind her for debt as her own, then, whatever may be private understanding between wife and husband, as to disposition by wife of

proceeds of loan, the writings are to be treated as embracing true substance of contract; fact that negotiations were all had through husband does not alter case, where transaction otherwise appears to be bona fide, etc. 19 App. 701 (1-b) (92 S. E. 232).

Where creditor, at time debt was created, intended in good faith to extend credit to the wife and not to the husband, and consideration of loan passed legally and morally to wife, and writings then executed purport to bind her for debt as her own whatever may be private understanding between wife and husband, in which creditor has no interest, as to disposition by wife of proceeds of loan, writings are to be treated as embracing true substance of contract. 23 App. 792 (1) (99 S. E. 705).

Where, in suit on note by wife as principal and by husband as surety, it appeared that proceeds of loan were used in carrying on farm owned by wife, and she contended that she was surety only and received no benefit from loan, and it appeared that wife's account to which loan was credited was carried on books under names of both husband and wife, and also that checks drawn on such account by both of them were paid by bank, it was proper to admit bank's books of account, to throw light upon question as to whom consideration of loan actually passed. 19 App. 701, 702 (2) (92 S. E. 232).

Where lender of money to married woman knows that she borrows to pay debt of husband and aids him in executing scheme by which loan is to be made upon security of her property, he being real borrower, debt for loan is not her debt; and if debt be that of

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husband, wife can not assume its payment. 23 App. 792 (2) (99 S. E. 705).

Where loan is made to married woman to pay debt of husband, taking by her of her husband's note for amount of loan, and subsequent suit thereon by her, will not estop her to plead statute in her favor, though upon such suit there be an entry of "settled," etc. 23 App. 792 (2-a) (99 S. E. 705).

Charge: Where, in suit against husband and wife as joint makers of contract of lease, the wife pleaded that she signed as surety for her husband, and there was evidence to authorize finding that she executed the contract as a principal instruction that a married woman can not become security or bind her estate by any contract of suretyship, and that if jury should believe that wife was a surety she can not be liable, sufficiently covered the issue involved. 13 App. 62 (78 S. E. 775).

Where contract was signed solely by wife, and evidence showed that she signed as principal thereof at husband's request, court properly refused to charge on law touching surety contracts by married women for their husbands. 16 App. 446, 448 (10) (85 S. E. 606).

Where court charged that if plaintiff advanced money without knowledge that transaction on part of wife was assumption of husband's debt or created a suretyship, she would be bound, charge that if plaintiff knew, at the time, that it was done for the purpose, and as part of fraudulent scheme or device, to evade this law in favor of a married woman, and he knew at time he took the papers it was a scheme to take wife's property as security for husband's debt, verdict should be for defendant, was not subject to exception that it was not authorized by the evidence. 18 App. 778 (2) (90 S. E. 724).

Charge that married woman can not be surety for debt of husband or anyone else, and that she can not assume the debt or promise to pay the debt of her husband, but that she is liable for her own debt and can contract to pay her own debt, and will be con-

trolled by the facts of the transaction, and that the jury will look to the substance, and if the debt is the debt of the wife in truth, she is liable, etc., is not subject to exception that it is not full or fair, or is limited or prejudicial. 21 App. 536 (3) (94 S. E. 818).

Creditors of husband: Sureties on defaulting tax collector's bond are creditors of the tax collector within this section. 143/156 (84 S. E. 554).

Death: Charge that wife has right to assume debts of husband after his death, if she so chooses, was not erroneous. 147/566 (2) (94 S. E. 999).

Deed: Where wife and daughter executed deed to one who used money to pay debts of husband and father, this would not give wife right to have deed canceled and to recover land, although grantee may have known of purpose of sale, unless he was party to scheme to get wife to sell, in which event wife could recover to extent of her interest in land. 145/368 (2) (89 S. E. 330).

If creditors of husband enter into an arrangement or scheme for purpose of having his wife execute deed of gift of her property to him, and for him to convey it to creditors in satisfaction of debt, deed from husband to creditors for payment of husband's debts stand just as if the wife, without conveying her property to the husband, had made a deed directly to the creditors for payment of the husband's debts, and would likewise be void. 149/383 (100 S. E. 365).

Estoppel: Where wife advances money to husband which is used in paying purchase price of land and in making improvements thereon, and wife sues husband for such money and obtains judgment, her election thus exercised to treat obligation of husband as debt will bar her from setting up equitable interest in the land on basis of implied trust, or upon basis of having purchased from her husband, with the money, an interest in the land. 148/146 (2) (95 S. E. 968).

Where wife, with knowledge that husband has taken title in his own name to property purchased with funds belonging to her, permits him to retain title and possession, and credit is ex-

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tended to him upon faith of his apparent ownership, she will be estopped from asserting her secret equity as against trustee in bankruptcy seeking to recover property to be applied on debts arising from credits extended on faith of husband's apparent ownership. 148/429 (2) (96 S. E. 867).

Evidence in action for land here did not warrant recovery on theory that plaintiff had conveyed the land to pay her husband's debt. 142/432 (1) (83 S. E. 103).

Evidence that creditors dealt exclusively with a husband and declined to extend him credit until the wife signed certain notes with him, and that they knew that she was a married woman and that she had no power to bind her estate by a contract of surety, demanded a verdict for the wife in suit brought against her and her husband on the notes as joint makers. 13 App. 63 (78 S. E. 832), 556 (79 S. E. 496).

Evidence showing that credit for goods was extended to married woman in her individual capacity, she was liable. 16 App. 608 (1) (85 S. E. 950).

Evidence here in action for price of fertilizers was insufficient to show contract with wife rather than with her husband. 145/323 (89 S. E. 218).

Fraud: Where wife did not in fact purchase and was not to receive machinery under contract sued on, but whole transaction was merely colorable scheme or device by which wife was induced by plaintiff to assume previous debt of husband, without any consideration flowing to her, she would have right to repudiate entire illegal and void transaction, no matter by what device its true inwardness and purpose had been concealed. 22 App. 358, 359 (4) (96 S. E. 9).

Joint: Wife may be liable on note executed by her jointly with her husband, where husband acted as her agent and she received consideration of note. 13 App. 309 (2) (79 S. E. 165).

Where husband and wife jointly signed note for clothing for wife and children they are joint debtors, and

there is no element of suretyship. 16 App. 606 (85 S. E. 950).

Jury: Question in suit upon account against married woman whether credit was given to wife or to husband is one of fact for jury. 22 App. 365 (1) (95 S. E. 1009).

Mortgage executed by wife on separate estate to secure money loaned to her by sureties on her husband's bond to pay shortage of her husband as tax collector was void. 143/156 (84 S. E. 554).

Where there was evidence that creditor relied on husband's apparent ownership of mortgaged property, testimony of wife that she was willing that husband mortgage property as his own was properly admitted. 15 App. 190, 191 (2) (82 S. E. 770).

If married woman borrows money and mortgages her property to secure repayment, and gives money to her husband, contract would be valid if creditor is not party to arrangement; but if husband induce wife to borrow money to pay his debts and husband's creditor is party to arrangement, contract is illegal. 146/791 (1-a) (92 S. E. 631).

Mortgage given by married woman to creditor of her son in extinguishment of debt of the son is valid. 19 App. 73 (1) (90 S. E. 977).

While married woman can not bind separate estate by contract of suretyship, she may extinguish debts of her son, or cause them to be extinguished, on her own credit, as an original undertaking, with a mortgage on her property as security for performance of her own contract. 19 App. 73 (1) (90 S. E. 977).

Necessaries: Married woman was personally liable for groceries furnished and charged to her pursuant to agreement, though husband was under legal obligation to procure such groceries. 143/150 (84 S. E. 542).

Note: Where wife pleaded that her note was invalid because given to pay husband's debt, and there was no evidence that husband was authorized to act as her agent in procuring money, error to permit plaintiff to testify that husband came to see whether plaintiff would let defendant

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have the money. 142/397 (1) (83 S. E. 112).

Where married woman executes mortgage note payable to order of her son, mortgage being on her separate estate, for sole purpose of enabling payee to use paper as collateral security, and after receiving paper payee informs bank of purpose for which note was executed and offers it as collateral and paper is accepted by bank and is duly transferred to bank, contract of maker with payee and with bank is merely that of surety. 146/26 (1) (90 S. E. 469).

Note purporting to be that of married woman, but given in discharge of pre-existing debt of husband, renders her surety. 146/791 (1) (92 S. E. 631).

Where great preponderance of evidence was to effect that defendant's notes were given in payment of husband's debt, but there was some slight evidence that debt was her own, reviewing court will not interfere with finding that wife was liable. 18 App. 161, 162 (5) (89 S. E. 77).

Defendant's plea that fertilizer for which her note was given was bought for her husband, and that she could not be held liable on the note, as it was an assumption of her husband's note, presented an issue of fact, which will not be disturbed, there being ample evidence to support the finding. 18 App. 173 (1) (88 S. E. 1009).

Where undisputed evidence showed that note sued upon was executed by defendant, a married woman, for the debt of her husband, verdict finding her liable thereon was contrary to law and evidence. 18 App. 247 (1) (89 S. E. 186).

Charge that if jury found that sale was about to be made to defendant's husband, and that insolvency of husband was ascertained, or that his financial condition was unsafe, and that plaintiff refused to sell to husband, but that sale was made to wife individually, and that she gave up her note closing the transaction as her individual transaction, jury should find in favor of plaintiff, was erroneous, as tending to place more favorable construction, in behalf of plaintiff, upon evidence than was authorized by facts

in case. 18 App. 247 (2) (89 S. E. 186).

Court erred in striking, on general demurrer, defendant's plea setting up that transaction in which she gave notes sued on was a scheme to subject her property to payment of debt of her husband. 18 App. 655 (90 S. E. 226).

Where note is signed by wife as principal and by husband as surety, presumption of law is that she gives it on her own contract and for value, to charge her separate property. 19 App. 701 (1-a) (92 S. E. 232).

Where married woman signs promissory note as principal, there is presumption of law that the instrument expresses the true intent of the contract. 20 App. 14 (1) (92 S. E. 721).

Where, in action upon note signed by married woman as principal, the burden imposed upon her does not appear to have been met by evidence introduced to sustain her plea of suretyship, and there was no evidence to support her plea of payment, judge did not err in directing verdict for plaintiff. 20 App. 14 (2) (92 S. E. 721).

Under the common law, married woman could not bind herself by execution of promissory note. 20 App. 14 (3) (92 S. E. 721).

Plea alleging that machinery described in notes sued on had been previously sold to husband, and that the notes, signed by the wife, were given in settlement of the notes and debts thus owing to plaintiff by husband for his purchase of said property, and denying that they were given for purchase of said property by the wife, and alleging that they were given without any consideration other than illegal assumption of her husband's debts, was sufficient on demurrer. 22 App. 358, 359 (4) (96 S. E. 9).

In action on notes signed by mother and son, where she alleged that she signed as surety, which she could not legally do, failure of trial court to state contention of plaintiff that she had participated in procurement of loan as credit extended in part to herself was error, notwithstanding later instructions drawing legal distinc-

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tion between principal and surety, and difference in legal effect of such contracts by married woman. 24 App. 613, 614 (2) (101 S. E. 696).

Original undertaker: Married woman may, as an original undertaker, become liable for goods furnished to another from which she derives no personal benefit. 19 App. 816 (1) (92 S. E. 299).

Sale: Where wife enters into unambiguous written contract whereby she is to become owner of certain timber, and agrees to pay stipulated price, she is bound as purchaser, if seller committed no fraud nor knew of any committed by her husband, notwithstanding that by reason of purchase an indebtedness of the husband, based upon prior sale of same property to him, was to be canceled. 21 App. 158 (2) (93 S. E. 1021).

Where wife enters into unambiguous written contract, whereby she is to become owner of certain personal property, and agrees to pay stipulated price therefor, she is bound as purchaser, if seller committed no fraud upon her nor knew of any committed by husband, notwithstanding that by reason of purchase an indebtedness of the husband, based upon prior sale of same property to him, was to be canceled; where purpose of contract is that wife shall pay only for what she bought, debt is as much her own as if there had been no previous sale of property to her husband. 22 App. 358, 359 (5) (96 S. E. 9).

§ 3008. (§ 2489.) **Minority of party to contract.**

Cited. 149/707, 708 (102 S. E. 21).

§ 3009. (§ 2490.) **Sale to husband or trustees.**

Cited. 147/474, 477 (94 S. E. 572).

Confirmation: Deed by wife to husband, there being no order of court, can not be confirmed by court of equity as against wife, at instance of husband, long after making of deed, but is a cloud on her title and may be canceled as such when it operates to her injury. 140/678 (3-b) (79 S. E. 557).

Consideration: Where in suit by heirs of

Services: Wife may, upon her own responsibility and voluntarily, enter into contract with another to render services for her husband and for his benefit, and from which she may receive no personal benefit; and for value of such services she may be held liable under her contract. 18 App. 475 (1) (89 S. E. 607).

Settlement: Inclusion, in settlement made by husband between debtor of wife and the wife, of certain items of husband's indebtedness, was not binding on the wife. 142/254 (1) (82 S. E. 663).

Tenant: Where owner of land rented same to a married man, a subsequent new and different agreement with the tenant's wife, whereby she was to take over the land and become the tenant instead of the husband did not amount to an assumption by the wife of the husband's obligation, but was an original undertaking on her part; that negotiations leading up to signing of rent notes by wife were had through husband would not change rule. 23 App. 193, 194 (2) (98 S. E. 170).

Third person: Charge that where married woman signs note or pledge, or mortgages her property for consideration that moves to third person, she or her estate receiving no benefit, she will be regarded as a surety, and if she is so regarded, and jury believes that she was a surety, she would not be bound upon the contract, and it would be duty of jury to find in favor of defendant, was error. 19 App. 73 (2) (90 S. E. 977).

deceased husband to recover land from one claiming under wife, uncontradicted evidence showed that husband conveyed land to wife for pecuniary consideration, not error to direct verdict for defendant. 145/215, 216 (5) (88 S. E. 947).

Estoppel: Deed of separate estate executed by wife to husband without order of court, wife not estopped, as against husband, from setting up that

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it is void, because deed, which reserved a life estate, was executed while husband and wife were living separately, and she received a consideration. 140/678 (3-d) (79 S. E. 557).

Evidence: Husband's deed to wife was admissible in suit by husband's heirs to recover land from one holding under wife, over objection that it was invalid because not authorized by order of court pursuant to this section. 145/215, 216 (4) (88 S. E. 947).

Gift: While wife can not make contract of sale of her separate estate to her husband without order of approval by judge of superior court of her domicile, she may make gift thereof to him. 147/488 (1) (94 S. E. 566).

Personal: Right to assail deed from husband to wife for money consideration is personal to wife and her privies in blood or estate, and can not be asserted by husband's heirs, suing to recover land from one holding by chain of title under wife. 145/215, 216 (3) (88 S. E. 947).

Right to assail deed as being invalid under this section is personal to the wife and her privies in blood or estate; it can not be asserted by a creditor of the husband, who had reduced his debt to a judgment against the husband after deed by husband to wife, and caused land to be levied on as property of husband under execution based on such judgment. 149/170 (1) (99 S. E. 531).

Repudiation: Where wife, for valuable consideration, conveys interest in land to husband, without approval of superior court, and husband, in name of wife and himself, sells timber thereon to another, taking purchase-money notes therefor in his own name, and purchaser, with knowledge and consent of wife, enters upon land and takes possession of timber, fact that wife afterwards objects to removal of remaining portion of timber, on ground that purchaser has breached terms of contract of purchase, can not be held to be repudiation by her of sale of timber to him, nor repudiation of sale of her interest

in the land to her husband. 20 App. 470 (2) (93 S. E. 111).

Rescission: Married woman who exchanged her property for property to which her husband and his partner took title not entitled to rescind as long as she remained in possession with her husband, and her husband and partner retained title and possession. 142/432 (1) (83 S. E. 103).

Sale: Where a wife living separate from her husband transferred her property to a third person to enable her husband to borrow money to pay alimony to her, the third person to convey the land to the husband upon payment of the debt, the transaction is invalid when not approved by the superior court. 141/24 (80 S. E. 276).

The conveyance was invalid as to the husband, the third person, and a purchaser from the husband with knowledge of the nature of the transaction. Id. 24 (2, 3).

Where wife executes deed conveying land to husband, which states that land was formerly purchased from other persons by husband and paid for by him, and he caused title to be taken in name of wife by her consent, to subserve certain purposes since accomplished, and as matter of right husband should have title in himself, and "in consideration of the premises" and natural love and affection she does hereby "convey," etc., such transaction does not amount to contract of sale by wife to husband, but is in effect a gift. 147/488 (2) (94 S. E. 566).

Where deed from wife to husband contains statement in substance as indicated in preceding paragraph, and recites a "further consideration of five dollars cash in hand paid" such deed upon its face is contract of sale by wife to husband. Id. 488 (3).

Contract by wife to sell her separate estate to husband is void unless it is allowed by order of superior court of county of her domicile. 148/858 (98 S. E. 497).

Separation: This section applies to sales by the wife of her separate estate to her husband while they are living in a state of separation, as well

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as while they are living together. 140/678 (2) (79 S. E. 557).

Vacation: Judge of superior court of county of wife's domicile has no jurisdiction to grant order in vacation allowing wife to sell her separate estate to her husband, and contract of

sale made in pursuance of such order is void. 148/858 (98 S. E. 497).

Void: Sale by married woman to her husband without being allowed by order of superior court of county of her domicile is not only voidable, but void. 140/678 (3) (79 S. E. 557).

§ 3010. (§ 2941.) **Wife may give to husband.**

Consideration: Proof merely that instrument purporting on its face to be warranty deed consummating sale, for stated consideration by wife to her husband, of land constituting separate estate, and made under vacation order of judge of superior court, was without consideration, would not convert it into deed of gift. 148/858 (98 S. E. 497).

Presumption: A wife may give her separate estate to her husband without order of superior court, but such a gift will not be presumed, and to establish it evidence must be clear, unequivocal, and free from doubt that parties intended transaction to be a gift. 148/858 (98 S. E. 497).

§ 3011. (§ 2492.) **A married woman may contract; presumption.**

Applied. 147/470 (1) (94 S. E. 568).

Charge here in action by married woman to recover land as to her intention to give property to her husband was authorized by evidence. 142/432, 433 (3) (83 S. E. 103).

Charge here on burden of proof in suit by judgment creditors of husband against him and wife, attacking for fraud conveyances from him to her, and by which it was sought to subject property so conveyed to the

debt, was harmless, in view of this section, though not appropriate. 142/533 (2) (83 S. E. 121).

Contracts of married women: See § § 2993, 2996, 2997, 3007, and 3009, and notes.

Fraudulent transactions between husband and wife: See § § 3224 (2), 3224 (3), catchword **Husband and wife**.

Slight evidence of fraud may be sufficient to carry case to jury. 13 App. 293, 295 (79 S. E. 88).

CHAPTER 2.

Of Parent and Child.

ARTICLE 1.

Legitimate Children.

§ 3012. (§ 2493.) **Legitimate children.**

Cited. 145/724, 725 (89 S. E. 815); 147/754, 757 (95 S. E. 295).

Evidence here was sufficient to authorize trial judge to find that reputed father and mother of children born out of lawful wedlock were subsequently married, and that father recognized children as his own; and to order that status of property involved be pre-

served until jury might pass upon evidence under proper instructions. 148/489 (1, 2) (96 S. E. 1038).

Presumption: Where evidence showed that prosecutrix had been separated from her husband for several years when reputed bastard child was born, there was no error in failure of court to charge that a child conceived dur-

Legitimate children.

ing wedlock is presumed to be legitimate, and that such presumption remains until removed by competent tes-

timony. 19 App. 83, 84 (5) (90 S. E. 1032).

§ 3013. (§ 2494.) **Legitimacy by order of court.**

Cited. 147/754, 757 (95 S. E. 295).

§ 3016. (§ 2497.) **Mode of adopting child.**

Cited. 144/571, 572 (87 S. E. 782).

Inheriting: Mere statements of one since deceased and surrender of children to him did not constitute legal adoption of children so that they could inherit his estate, where there was no adoption pursuant to this and

following sections. 144/644 (1) (87 S. E. 1061).

Mandatory provision: There can be no legal adoption except as provided by this and following sections. 144/644 (1) (87 S. E. 1061).

§ 3020. (§ 2501.) **Parent's obligation.**

Co-tenants: Where father, though not a guardian, has property in his hands belonging to his son as co-tenant, the father, in an equitable accounting on trial of claim case, had right of set-off against son for money expended for son while a minor where father was insolvent and such expenditure was necessary. 146/464 (4) (91 S. E. 476).

Divorce decree awarding custody of minor child to mother, with privilege of father to see child, and directing that he contribute to child's support "as he has been doing," does not relieve father from legal obligation to properly support child. 22 App. 192 (1) (95 S. E. 738).

Mother: "Parent" has often been held to include the mother. 15 App. 693, 696 (84 S. E. 185), citing 6 Words & Phrases, 5173.

Necessaries: Divorced woman who had been awarded custody of child who had been abandoned by father, is liable for necessities furnished to child. 15 App. 693 (1) (84 S. E. 185).

Where mother became non compos mentis and was committed to sanitarium, her estate is responsible for necessities furnished child. Id. 693 (2).

Petition here in action against alleged father of child, by her grandmother, for value of necessities and care of child, held to set forth cause of action. 24 App. 242 (1) (100 S. E. 643).

§ 3021. (§ 2502.) **Parental power, how lost.**

1.

Essentials: First essentials of contract for adoption of child, where no statutory adoption exists, is that it be made between persons competent to contract and be based upon sufficient legal consideration. 148/25, 26 (1) (95 S. E. 673).

Terms: Prima facie right to custody of

infant is in father; and where this is resisted upon ground that father has relinquished parental right by contract, clear and strong case must be made, and terms of contract, to have effect of depriving father of his control, must be definite and certain. 149/122 (2) (99 S. E. 292).

3.

Cited. 15 App. 693, 695 (84 S. E. 185).

General Note.

Abandonment of family by a father results in his losing parental control over his minor children and right to

their services and proceeds of their labor. 13 App. 458 (1) (79 S. E. 356).

 Legitimate children.

Earnings: Diminished earning capacity of injured minor employee from date of injury to date of his majority was matter which concerned his father, earnings in that interval belonging to father and not to child. 144/716, 717 (3) (87 S. E. 1029).

Earnings of minor child belong to father unless child has been manumitted by the father. 148/25, 27 (3) (95 S. E. 673).

Earnings of minor son belong to father in absence of any surrender of his parental rights. 20 App. 393 (2) (93 S. E. 42).

Where father hires minor son to employer to do certain work, and employer, without consent of father, puts son to more hazardous employment, and son is injured, father may sue employer in his own behalf for recovery of such diminution of son's earning capacity, between date of injury and date of attaining his majority, as injury may have occasioned. 23 App. 299 (1) (98 S. E. 192).

Grandmother: A grandmother who accepted the gift of a grandchild from the mother with the consent of the father, and raised such child until at the age of 17 it was killed, is entitled to recover the value of the child's services until majority, though

§ 3022. (§ 2503.) **Mother's rights.**

Discretion conferred on courts by section 2972, Civil Code, in determining habeas corpus proceedings for deten-

§ 3022 (a). **Custody of minor children.**

Applied. 147/616 (1) (95 S. E. 113).

§ 3025. (§ 2506.) **Mutual protection.**

Injunction: Where man has debauched minor girl and induced her to abandon parental abode and live with him in state of adultery and fornication, and persists in continuance of such conduct, equity will afford remedy by injunction, and to that end, in suit by

the gift of the child occurred before the passage of this section. 13 App. 781 (1) (80 S. E. 29).

Injunction: Where man has debauched minor girl and induced her to abandon parental abode and live with him in state of adultery and fornication, and persists in continuance of such conduct, equity will afford remedy by injunction, and to that end, in suit by father, will enjoin man from associating and communicating with the girl, either by writing telephoning, telegraphing, personally or through the aid or agency of any other person. 149/227 (1) (99 S. E. 861).

Mother who has care and custody of minor child who has been abandoned by his father is entitled to services of child and proceeds of his labor. 13 App. 458 (2) (79 S. E. 356).

Pleading: Petition in action for wrongful death of plaintiff's grandchild, relative to consent of child's father to its adoption by plaintiff held sufficient as against mere general demurrer. 13 App. 781 (2) (80 S. E. 29).

Services: Where parent sues one, who without his consent employed his minor son, for value of services, defendant may set off value of necessities supplied to minor. 13 App. 458 (3) (79 S. E. 356).

tion of child, applies to the ordinary. 141/535 (2) (81 S. E. 433).

father, will enjoin man from associating and communicating with the girl, either by writing, telephoning, telegraphing, personally or through the aid or agency of any other person. 149/227 (1) (99 S. E. 861).

Illegitimate children. Of guardian and ward; their powers, duties, resignation, etc.; how and by whom appointed.

ARTICLE 2.

Illegitimate Children, or Bastards.

§ 3026. (§ 2507.) **Bastard.**

Cited. 145/724, 725 (89 S. E. 815).

§ 3027. (§ 2508.) **Father's obligation.**

Support: Agreement by reputed father of child with the mother to pay a certain amount for the support of the child is founded on a good con-

sideration and is valid. 13 App. 469 (2) (79 S. E. 366).

The mother, and not the child, has a right to sue on the contract. Id. 469, 470 (4).

§ 3029. (§ 2510.) **Inheritance by bastard.**

Cited. 143/342, 345 (85 S. E. 105).

Brother and sister: Where decedent was a bastard, his brother and sister by the same mother, who were also bastards, inherited his property. 146/367 (2) (91 S. E. 115).

Heirs: Where illegitimate child is received, when an infant, by putative father into his home under contract with mother to adopt child and make him heir at law, and where father recognizes child as son until and after

child's majority, but contract does not amount to legal adoption, and no steps are taken by child in his lifetime to have contract specifically enforced, his heirs at law can not maintain petition in equity to have contract specifically performed and to recover estate of father, consisting wholly of personalty; right of action vests in passes to personal representative of such child. 147/754 (95 S. E. 295).

§ 3030. (§ 2511.) **By legitimate from illegitimates.**

Cited. 143/342, 345 (85 S. E. 105).

CHAPTER 3.

Of Guardian and Ward.

ARTICLE 1.

Their Appointment, Powers, Duties, Liabilities, Settlements, Resignation, etc.

SECTION 1.

How and by Whom Appointed.

§ 3035. (§ 2516.) **General guardian.**

Evidence: On issue as to appointment of one of two applicants as guardian of the person of a minor, it was not

error to admit in evidence provision of will executed by minor's mother shortly before death, in which one

The powers, duties and liabilities of guardians.

of the parties was selected as trustee or guardian. 24 App. 109 (1) (99 S. E. 892).

In application for appointment of one as guardian of the person of a

minor, evidence by the applicant as to the minor's property and his income was not objectionable as irrelevant and immaterial. 24 App. 109 (2) (99 S. E. 892).

§ 3047. (§ 2528.) **Bond and oath.**

Cited. 143/497, 503 (85 S. E. 742).

§ 3051. (§ 2532.) **Proceedings in case of misconduct.**

Evidence: Fact that counsel representing guardian resisting removal did not at trial before ordinary raise point that plaintiff had failed to show her appointment and qualification as guardian

did not prevent ordinary from rendering judgment adverse to plaintiff, on account of her failure to establish by proof necessary averment. 20 App. 569 (2) (93 S. E. 223).

§ 3052. (§ 2533.) **Motion by surety.**

Note: Discharge of surety authorized where guardian used funds of ward in paying for land bought by guardian for herself and title to which she took in her own name, although she executed note, payable to herself as

guardian, for amount so used and seven per cent interest thereon, and, to secure payment, mortgaged to herself as guardian land sufficient for purpose. 23 App. 453 (98 S. E. 399).

§ 3054. (§ 2535.) **Suit on guardian's bond.**

Cited. 18 App. 369, 377 (89 S. E. 461).

Account: Court did not err in charging that failure to account for money received by one as guardian and placed

to his individual credit would be breach of guardian's trust, for which surety on guardian's bond would be liable. 18 App. 418 (1) (89 S. E. 492).

§ 3055. (§ 2536.) **A ward may sue his guardian.**

Cited. 18 App. 369, 377 (89 S. E. 461).

SECTION 2.

The Powers, Duties and Liabilities of Guardians.

§ 3060. (§ 2541.) **Amount of expenditure.**

Approval: Contract not approved by ordinary entered into by one as guardian of property of his ward to pay another for maintenance and education of the ward can not support judgment binding corpus of ward's estate. 22 App. 394 (1) (95 S. E. 1004).

Where it is admitted that ordinary had not given his approval to contract entered into by guardian of property of his ward to pay another for maintenance and education of ward, and where evidence fails to show that there

were at any time any profits of such estate in hands of guardian, verdict and judgment against all the property of ward's estate is illegal. 22 App. 394 (2) (95 S. E. 1004).

Petition by sureties of administratrix to enjoin suit on judgment against administratrix, in so far as it set up that administratrix had expended corpus of share of distributee, was demurrable, where it was not shown that any proper orders from authorized court had allowed such expenditures,

The powers, duties and liabilities of guardians.

or that they had been set forth in return properly made and allowed.

147/711 (2) (95 S. E. 251).

Charge in suit against guardian to vacate judgment of dismissal on ground of fraud, order for sale and sale thereunder of realty being attacked, that if petition for sale was for support, maintenance and education of plaintiff, she could not recover, was error. 145/563 (3) (89 S. E. 682).

Discretion: Ordinary may, in his discretion, allow corpus of ward's estate, in whole or in part, to be used for education and maintenance of ward. 145/563 (3-b) (89 S. E. 682).

Income: Primarily the income, and not corpus, of ward's property is to be resorted to for purpose of education, maintenance and making necessary repairs on ward's property. 145/563 (3-a) (89 S. E. 682).

§ 3061. (§ 2542.) **Binding out indigent orphans.**

Burden: Failure of executor or guardian to make returns is omission of duty, and therefore a breach of trust, and throws on him burden of proving to

Liens for municipal taxes and street pavement assessments arise by operation of law, and do not depend for validity upon contract express or implied; hence, where real estate of ward is impressed by such liens and his guardian pays them off, guardian will be allowed, in equitable accounting, to encroach upon corpus of estate for reimbursement, where there are not sufficient funds arising from income. 149/404 (1) (100 S. E. 362).

Permanent improvements: Guardian is not authorized to sell or encumber property of ward for purpose of erecting permanent improvements on it; if he erects permanent improvements with own money, he can not obtain legal order of ordinary, or court of ordinary, to sell it to reimburse himself. 145/563 (3-c) (89 S. E. 682).

satisfaction of court and jury that he has discharged the duty of his trust with fidelity. 22 App. 738 (2) (97 S. E. 261).

§ 3064. (§ 2545.) **Guardians may sell estates for reinvestment.**

Cited. 145/563, 568 (89 S. E. 682).

Order: Guardian can not sell his ward's property, except by order of judge

of superior court, under this section, or by order of ordinary. 16 App. 559 (1) (85 S. E. 766).

§ 3065. (§ 2546.) **Notice of application.**

Cited. 145/563, 568 (89 S. E. 682).

§ 3066. (§ 2547.) **Sales.**

Cited. 145/563, 568 (89 S. E. 682).

Order: Deed purporting on its face to have been made by guardian of minor, under authority of superior court, is inadmissible in evidence without production of decree of court

or certified copy of it. 141/653, 654 (3) (81 S. E. 1119).

Public outcry: Sale of ward's property by guardian must be at public outcry, under this section and section 4022. 16 App. 559 (1) (85 S. E. 766).

§ 3071. (§ 2552.) **Commissions.**

Corpus: Where guardian receives and disburses estate of ward, he is entitled to statutory commissions, unless he forfeits them on grounds provided by law, and in accounting between guardian

and ward, such commissions may be charged against corpus of estate as well as the income. 149/404, 405 (2) (100 S. E. 362).

Ordinaries as custodians of minors' moneys.

§ 3074. (§ 2555.) **Contracts of guardians.**

Petition here against beneficiaries of trust on account for fertilizer sold to their father and their guardian for	use on land in which they had beneficial interest did not state cause of action. 145/608 (89 S. E. 681).
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SECTION 2 (a).

Ordinaries as Custodians of Minors' Moneys.

§ 3075 (a). **Custody and distribution when no legal guardian.** [The ordinaries of the several counties of this State are hereby made and constituted the legal custodians and distributors of all money due and owing to any minor child or children, who have no legal and qualified guardian, to receive and collect all such money due or owing such minor or minors arising from insurance policies, benefit societies, legacies, inheritances, or from any other source; provided, the amount due such minor or minors from all sources does not exceed the amount of five hundred dollars, without any appointment or qualifying order, he is fully authorized to take charge of such money or funds for such minor or minors, by virtue of his office as ordinary in the county of the residence of such minor or minors, and the certificate of such ordinary, that no legally qualified guardian has been appointed for such minor or minors, and that the estate of such minor or minors, from all sources, does not exceed the amount of five hundred dollars (\$500.00) shall be conclusive, and shall be sufficient authority to justify any debtor or debtors in making payment of moneys due as aforesaid, claims therefor having been made by such ordinary.]

Acts 1918, p. 198.

§ 3075 (b). **Employment of counsel.** [The ordinary of the county of the residence of such minor or minors, is hereby authorized and permitted, in his discretion, to employ counsel to bring suit to recover any amount due such minor or minors in the name of such ordinary as guardian for such minor or minors, in any court having jurisdiction thereof, and such ordinary shall have authority to pay such counsel so employed a reasonable fee for his services in such matters which is necessary to enforce the rights of such minor or minors, out of the funds so collected.]

Acts 1918, p. 199.

§ 3075 (c). **Compensation.** [Such ordinaries shall receive as their compensation for such services five per cent. on the amount so handled.]

Acts 1918, p. 199.

§ 3075 (d). **Record open to inspection.** [It shall be the duty of such ordinaries to keep a well-bound book properly indexed, in which a com-

Settlement of guardian, resignation, and letters dismissory.

plete record shall be kept of all money received by him for such minor or minors; said record shall show from what source said funds were derived, and to show to whom and for what purpose such money was paid, which book shall be open for inspection of the public at all times as other records in his office.]

Acts 1918, p. 199.

§ 3075 (e). **Liability on bond.** [Such ordinaries shall be held accountable on their official bond for the faithful discharge of their duties as such guardians and for the proper distribution of funds coming into their hand as such guardians.]

Acts 1918, p. 199.

§ 3075 (f). **Payments authorized.** [The ordinary receiving such funds is hereby authorized and directed to pay out said funds so received by him, or whatever amount he may think necessary, for the support, education and maintenance of such minor or minors, as he may think in his judgment proper and right, and when so expended shall be final, and no liability shall attach to such ordinary or his bondsmen by reason of such expenditure when properly done.]

Acts 1918, p. 199.

§ 3075 (g). **Deposit of funds.** [When any such funds shall come into the hands of the ordinary of any county belonging to such minor or minors, and there shall be no cause or necessity arising for the paying out of said funds for the support, education and maintenance of such minor or minors, then in that event it shall be the duty of such ordinary to place said funds in some good and solvent bank, in the savings department of such bank at the then current rate of interest allowed on savings deposits, and when so deposited there shall be no further liability against such ordinary or his bondsmen when such deposit is made in good faith.]

Acts 1918, p. 200.

SECTION 3.

Settlement of Guardian, Resignation, and Letters Dismissory.

§ 3076. (§ 2557.) **Settlements before the ordinary.**

Separate accounts: Where guardian represents more than one ward, he should keep separate accounts with them; and in accounting with his wards, guardian's accounts should show his status with each ward separately; and if ac-

counts are mingled, guardian will not be entitled to charge for such advances as are not shown to be made for one particular ward. 149/404, 405 (3) (100 S. E. 362).

Guardians of lunatics, idiots, and persons non compos mentis.

§ 3086. (§ 2567.) **Letters of dismissal.**

General Note.

Setting aside: Evidence that expenditures by guardian were made after consulting ordinary is admissible on question of good faith in action by

ward after becoming of age to set aside judgment of dismissal of guardian. 145/563 (1) (89 S. E. 682).

ARTICLE 2.

Guardians of Lunatics, Idiots, and Persons non Compos Mentis.

§ 3089. (§ 2570.) **For whom guardians may be appointed.**

Temporary insanity: Person may not maintain suit in his own name while temporarily non compos mentis. 148/612 (1) (97 S. E. 670).

Weakness of mind: Where, though very weak in mind, person has enough ca-

capacity to understand nature of particular cause of action, and will enough to desire to bring suit thereon, he may do so without next friend or guardian. Id.

§ 3092. (§ 2573.) **Examination of capacity to manage his estate.**

Upon the petition of any person, on oath, setting forth that another is liable to have a guardian appointed (or is subject to be committed to the Georgia State Sanitarium), the ordinary, upon proof that ten days' notice of such application has been given to the three nearest adult relatives of such person, or that there is no such relative within this State, [or where such notice is waived in writing by such relatives, and affidavit is made by any one of such relatives, or other person, that such person is violently insane and is likely to do himself bodily injury, and where the truth of such affidavit has been verified in writing by a practicing physician appointed by the ordinary to examine such person,] (a) shall issue a commission directed to any eighteen discreet and proper persons, one of whom shall be a physician, requiring any twelve of them, including the physician, to examine by inspection the person for whom guardianship (or commitment to the Sanitarium) is sought; provided, that in all lunacy cases the legal number of jurors shall be six, one of whom shall be a physician, unless twelve are demanded by the party being tried, or by some one of his relatives or friends; and to hear and examine witnesses on oath, if necessary, as to his condition and capacity to manage his estate, and to make return of such examination and inquiry to the said ordinary, specifying in such return under which such classes they find said person to come. Such commission shall be sworn, by any officer of this State authorized by the laws of this State to administer an oath, well

Guardians of lunatics, idiots, and persons non compos mentis.

and truly to execute said commission to the best of their skill and ability, which oath shall be returned with their verdict.

Act 1834, Cobb, 343. Act 1838, Cobb, 345. Acts 1855-6, p. 151. 1889, p. 70. 1897, p. 109. 1901, p. 38. (a) Acts 1915, p. 20.

§§ 3101, 3103, 3105. § 871 P. C.

Receiver: Appointment of receiver of property of father and granting of injunction against interference with property in receiver's hands, after institution of proceedings by his chil-

dren, without his knowledge, to have guardian appointed for him, was erroneous, where children had no interest in property. 144/249 (2) (86 S. E. 932).

§ 3094. (§ 2575.) **Appeal.**

Conditions precedent: Payment of costs and giving security for future costs and damages is prerequisite to appeal from return of committee and judgment of ordinary in proceedings to determine whether person named is subject to be committed to State Sanitarium. 145/48 (1) (88 S. E. 575).

Modification: This section is not modified by section 5010 so as to allow appeal without paying costs and giving bond by one declared a lunatic, who has made pauper affidavit. 145/48 (1-a) (88 S. E. 575).

§ 3101. (§ 2582.) **Proceedings by third persons.**

Fees: Ordinary of county can legally charge \$5.00 and no more, for his entire services in any lunacy case tried

before him. 18 App. 30 (3) (88 S. E. 913).

§ 3102. (§ 2583.) **Expenses of proceedings, how paid.**

Mandamus: Where a county treasurer improperly refuses to pay legal warrants drawn upon him, remedy is by

mandamus against him, and not by direct suit against the county. 21 App. 225 (3) (94 S. E. 271).

§ 3106 (a).* **Examination of capacity to manage his estate.** [Upon the petition of any person, on oath, setting forth that another is liable to have a guardian appointed (or is subject to be committed to the Georgia State Sanitarium), the ordinary, upon proof that ten days' notice of such application has been given to the three nearest adult relatives of such person, or that there is no such relative within the State, or where such notice is waived in writing by such relative, and affidavit is made by any one of such relatives, or other person, that such person is violently insane and is likely to do himself bodily injury, and where the truth of such affidavit has been verified in writing by a practicing physician appointed by the ordinary to examine such person, shall issue a commission directed to three reputable persons, two of whom shall be practicing medical physicians in good standing, said physicians to be residents of the county, if that number reside therein, and the county attorney or solicitor of any city court located in said county, and if no county attor-

*This law was apparently intended to supersede prior enactments, but since the laws repealed were not specified, it was thought advisable to leave the old laws as they were and insert the new law here as sections 3106 (a)-3106 (c).

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ney or solicitor of said city court, the solicitor-general of the circuit or some attorney of the county appointed by him, requiring them to examine by inspecting the person for whom guardianship or commitment to the sanitarium is sought, and to hear and examine witnesses on oath, if necessary, as to his condition and capacity to manage his estate, and to make return of such examination and inquiry to the said ordinary, specifying such returns under which such classes they find said person to come. Such commission shall be sworn by any officer of this State authorized by the laws of this State to administer an oath, well and truly to execute such commission to the best of their skill and ability, which oath shall be returned with their verdict. No guardian shall be appointed for the estate of such person, nor shall such persons be committed to the sanitarium without the unanimous verdict of such commission.]

Acts 1918, p. 162.

§ 3106 (b). **Expenses of proceedings, how paid.** [It shall be the duty of each ordinary of this State to draw his warrant upon the treasurer of his county for such sum or sums as shall be actually necessary or requisite to defray the expenses of trying every commission of lunacy, provided the sum to be paid in each case shall not exceed \$10.00, and actual expenses to each of said reputable physicians, the reputable person not a physician shall not receive more than \$5.00 in each case, and for carrying on or conveying such insane person from such county to the sanitarium when such insane person shall be lawfully committed to the sanitarium. When females are committed to the sanitarium, they shall be accompanied thereto by a relative, female nurse or female attendant, at the expense of the county: Provided that no money shall be drawn from the county treasury for the purposes herein set forth when the estate of such insane person is sufficient to defray such expenses.]

Acts 1918, p. 163.

§ 3106 (c). **Sanitarium free, to whom.** [Said sanitarium shall be free to all the resident citizens of this State, who may be lunatics, idiots, epileptics or demented inebriates, and who are paupers, and who, when admitted, shall receive free the same food, raiment and medical and other attention as shall be provided for the inmates generally, and all resident citizens of this State of the above description whose estate does not exceed the sum of three thousand dollars or sufficient to provide for them, may be admitted upon the payment for such reasonable sum for board and keep as may be prescribed by the trustees: Provided, however, that no paralytics, epileptics, imbeciles, idiots, drug or alcoholic addicts, persons suffering from tubercular, venereal or other contagious diseases, whether paupers or not, who are harmless and inoffensive in spirit, and who, if unconfined, would reasonably involve no danger to the life or limb to

Master and servant; master's liability to servant.

those with whom they would be associated, shall be committed or admitted to said sanitarium, and provided further, that if the family or friends of any inmate shall desire to furnish extra or additional food or other comforts they may be allowed so to do, at their own expense, under such rules and regulations as said trustees may prescribe, and providing further, that any funds belonging to any inmate of said sanitarium where there has been no guardian appointed for such inmate, shall be turned over to the board of trustees of the State sanitarium and used toward the board and clothing and other expense of such inmate, and in the event any such inmate shall be discharged as being cured, any balance remaining in the hands of said board of trustees shall be turned over to such inmate.]

Acts 1918, p. 163.

CHAPTER 4.

Master and Servant.

ARTICLE 2.

Master's Liability to Servant.

§ 3129. (§ 2610.) Injuries to coemployees.

Cited. 21 App. 262, 263 (94 S. E. 256).
 Stated. 141/46 (2) (80 S. E. 290); 13
 App. 618, 619 (3) (79 S. E. 587);
 15 App. 33 (82 S. E. 586); 22 App.
 651, 652 (4) (97 S. E. 114); 23
 App. 334 (2) (98 S. E. 241), 354 (2)
 (98 S. E. 237).

Appliance: When master has furnished safe appliances, and injury to servant is plainly attributable to negligence of fellow servants in manner of using them or of failure to use them, master is not liable. 15 App. 709 (1) (84 S. E. 230).

Where proper appliances are furnished, and injury to servant is occasioned, not by reason of defect therein, but on account of negligence of fellow servants in failing to properly use them a master is not liable. 23 App. 187 (3) (97 S. E. 865).

Assumption of risks: Where petition showed that if servant was injured, he was injured by negligence of fellow servant, and that injury was incident to risk assumed in the service, court

did not err in sustaining demurrer and dismissing petition. 18 App. 508 (89 S. E. 600).

Petition here in action by employee of city against the city for personal injuries held subject to demurrer based on ground that injury alleged was caused from risk incident to employment and that it appeared that plaintiff was injured by negligence of co-employee. 21 App. 281 (94 S. E. 657).

Where injured servant knew of incompetency of fellow servant, or by exercise of ordinary care could have known of it, or had equal means with master for knowing it, but nevertheless continued in master's employ and sustained an injury he can not recover, even though it appears that master knew or ought to have known of the fellow servant's incompetency. 21 App. 603 (4) (94 S. E. 855).

Building: Laborer employed to assist in placing joists on walls of brick building recently constructed by brick ma-

Master's liability to servant.

sons to second story is fellow servant with such masons about the same business. 146/300 (1) (91 S. E. 100); 23 App. 249 (97 S. E. 867).

Where, while engaged in placing one end of joist on wall recently constructed, loose brick therein turned under laborer's foot, causing him to fall and be injured, master is not liable on account of negligence of mason in not properly placing and securing the brick in the wall, it not appearing that master knew of incompetence of mason when he was employed, or because master failed to warn laborer of defect. 146/300 (2) (91 S. E. 100); 23 App. 249 (97 S. E. 867).

Charge: Court erred in failing to submit fellow-servant doctrine, notwithstanding there was no timely written request for any charge, where defendant's plea interposed defense that injury occurred solely through negligence of fellow servant, but there was some evidence tending to support such inference. 20 App. 549 (2) (93 S. E. 169).

Child under 14 years of age does not assume risk of negligence of fellow servant, but is chargeable with contributory negligence resulting from want of such care as his mental and physical capacity fits him for exercising. 144/716 (2) (87 S. E. 1029).

In view of plaintiff's pleading and evidence here it was error to charge that plaintiff was under 14 years of age at time of injury. *Id.*

Infant employees over 14 years of age are presumed to assume risks which law makes incident to their employment. 17 App. 410, (87 S. E. 149).

See catchword **Child**, in general note on injuries to railroad employees following § 2787, and in general note on master and servant following § 3131.

Common law: At common law, if negligence was that of fellow servant there could be no recovery. 19 App. 521, 522 (91 S. E. 898).

Concurrent negligence: For negligence of a fellow servant to relieve the master from liability, it must have been the sole cause of the injury, unmixed with any negligence of the master or his representatives. 13 App. 799 (6) (81 S. E. 269).

Where master is negligent and such negligence approximately causes injury, he is liable, though fellow servant was also negligent, and his negligence contributed to injury. 144/716 (2) (87 S. E. 1029).

Where injury to servant resulted from concurrent negligence of master and fellow servant, but would not have been sustained but for master's failure to perform his duty, master is liable. 22 App. 180 (2) (95 S. E. 749).

Master is not liable for injuries resulting to servant from concurrent negligence of plaintiff himself and a fellow servant. 23 App. 354 (2) (98 S. E. 237).

Where court incorrectly charged as to liability for injuries to servant from concurrent negligence of plaintiff himself and a fellow servant, new trial will be granted, although in other and different portions of the charge the judge correctly charged the jury upon the question involved, but did not undertake to correct the erroneous charge given. 23 App. 354 (2) (98 S. E. 237).

In action for injuries to employee while working in close proximity to high powered electric wire, declaration alleging that plaintiff while "in charge and control of" and "working under the direction of" defendant's foreman, owing to joint negligence of defendant and its foreman in failing to provide reasonably safe place to work and reasonably safe appliances, and in failing to give warning and instructions as to danger, was injured, etc., alleged joint negligence of defendant and its foreman. 24 App. 458 (1) (101 S. E. 397).

Jury: Where there was no evidence that master should have known of dangerous condition arising from fellow servants failing to use safe appliance, and that plaintiff did not have equal means of knowing same, not error to grant nonsuit. 15 App. 790 (2) (84 S. E. 230).

Mason: See **Building**.

Order: While under law of South Carolina servant may not recover for injuries through negligence of fellow servant, he may recover for injury resulting from improper order given by

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one authorized to supervise or direct work. 14 App. 139 (1) (80 S. E. 667).

Where general utility and repair workman was directed by his foreman to assist in repairing attachment of machine and carry it aside, and attachment, on account of weight and inability of foreman to guide it, fell upon such workman, unaware of the excessive weight and consequent danger, known to master, proximate cause of injury might be regarded as master's wrongful act through its foreman in giving the order, though he might be regarded as a fellow servant while assisting. 24 App. 738 (2-a) (102 S. E. 167).

See **Safe place**.

Railroads: Carpenter employed in constructing dry kiln for use in sawmill business is fellow servant of engineer and fireman in charge of engine and tram cars employed by their common master in operation of such business. 15 App. 108 (1) (82 S. E. 666).

Where employee was injured while being transported home on tram car, it being employee's intention to return to work, those in charge of car were his fellow servants. *Id.* 108, 109 (2).

Under this section and section 3602, there can be no recovery for injury arising alone from negligence of fellow servant except in case of railroad company. 16 App. 737 (1) (86 S. E. 82).

Railroad company is liable to employee for injuries caused by negligence of co-employees. 16 App. 738 (2) (86 S. E. 62).

Immaterial in suit for personal injuries received in service of receiver operating railroad whether negligence was that of co-employee, or of master, or of one in authority under him. *Id.* 738, 739 (6).

Rules: Under the facts here, there is no reason why there should be different application of fellow-servant rule by virtue of principle of law to effect that where work of master is complex and involves presence and co-operation of a number of laborers, so situated that independent individual action on their respective parts would

render doing of work unsafe, duty devolves upon master of organizing and maintaining system by which work can be done with reasonable safety, and if he chooses to leave to employee regulation of matters which he ought to have provided for by rules, such employee will not be regarded as fellow-servant of laborers who do his work. 22 App. 651, 652 (4) (97 S. E. 114).

Safe place: Master's duty to furnish his servant a safe place in which to work is a continuing one. 13 App. 799 (5) (81 S. E. 269).

Among absolute, continuous, and non-assignable duties of master to servant is duty to furnish latter safe place to work, and to refrain from giving orders which will require servant to put himself in position where he will be subject to risk of injury from dangerous instrumentality. 22 App. 309, 310 (2) (96 S. E. 16).

Selection of servants, duty of master with regard to: See general note on master and servant following § 3131, catchword **Selection**.

Stone: One employed by stone company in cutting or breaking of stone for paving or Belgian blocks is fellow-servant with engineer and fireman of locomotive operated by same company in connection with such stone industry, and with employees engaged in making blasts in the quarrying of such stone, and therefore can not recover damages from master for injuries attributable to their negligence. 22 App. 651 (2) (97 S. E. 114).

Vice-principal: That defendant's vice-principal directed plaintiff to perform particular act did not relieve plaintiff from legal consequences of assuming risk of obvious danger. 16 App. 668 (2) (85 S. E. 977).

Master not liable for injury from negligent act of superintendent in discharge of duties outside master's non-delegable duties and while doing servant's work. *Id.* 668 (3).

The term "vice-principal" includes any servant who represents master in discharge of those personal or absolute duties which every master owes to his servants, such duties being gen-

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erally referred to as the non-assignable duties of the master. 19 App. 554 (1) (91 S. E. 923).

While doing a servant's work engaged solely in executing the ordinary details of labor in connection with another servant, a foreman who in other respects stands in the place of the master is a fellow-servant, and his negligence therein will not render master liable to other servant, except where master is railroad company. 20 App. 617 (93 S. E. 260).

"Vice-principal," as used in fellow-servant law, includes any servant who represents master in discharge of those personal or absolute duties which every master owes to his servants, such as providing suitable machinery and appliances, safe place to work, proper inspection and repair of premises and appliances, selection and retention of suitable servants, establishment of proper rules and regulations, and instruction of servants as to kind and manner of work to be done by them. 22 App. 309 (96 S. E. 16).

Allegation in petition that certain person was agent of defendant employer, who had control of the kind, place, and manner of work of plaintiff, and whose duty it was to give orders to plaintiff as to the kind, place, and manner of work, and as to the instrumentalities to be used by plaintiff in work; that it was plaintiff's duty to obey orders of said person, and particularly duty to obey order to use appliance which caused injury to plaintiff and to use it in manner ordered by said person, was sufficient allegation that said person was a vice-principal. 22 App. 309, 310 (4) (96 S. E. 16).

Petition here, as amended, set forth cause of action for injuries as result of acting on directions and assurances of vice-principal. 22 App. 309, 310 (5) (96 S. E. 16).

Servant must obey command, given as such, by vice-principal, if it pertains to duties of employment and does not involve violation of law, and if act required is not one which is of itself so obviously dangerous that no person of ordinary prudence could be ex-

pected to perform it. 23 App. 47 (1) (97 S. E. 453).

Where, under circumstances existing at time of issuance, giving of order by vice-principal constitutes an act of negligence, but servant, acting under duty and obligation resting upon him, proceeds to execute command and is injured as consequence, master is liable for injuries sustained. *Id.*

Where vice-principal enters upon discharge of duties relating solely to ordinary work and functions of a servant, he will be presumed to have assumed status of a servant, and master is not liable for his negligence causing injury to another servant. *Id.* 47 (2).

Where one who is in fact a vice-principal gives what ordinarily would amount to nothing more than a usual and customary work signal, but in such manner as to indicate that he is assuming to speak as representative of the master and that with his authority he is engaged in giving a command, mere fact that nature of order may in effect correspond with what would ordinarily amount to nothing more than work signal if issued by servant, would not prevent order from having full force and authority of a command. *Id.*

Where petition contained no allegation charging negligence in not inspecting gang-plank, failure to properly secure which caused plaintiff's injuries, and it appeared from plaintiff's testimony that placing and securing of gang-plank was ordinary duty of himself and fellow servants, court did not err in excluding following question and plaintiff's answer: "Whose business was it to have fixed that gang-plank?—It was our foreman's business to see that it was fixed right." 23 App. 187 (4) (97 S. E. 865).

Although words "superintendent," "manager," and the like do not necessarily import that employee bearing such title was vice-principal of master, such designation, coupled with other facts, was sufficient to raise question for jury as to whether he was, on occasion in question, vice-principal of master. 24 App. 445 (1) (101 S. E. 300).

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Neither the words "superintendent" or "foreman" necessarily imports that one to whom they are applied is the alter ego of the defendant master, but where one designated as such has authority to employ laborers and is in charge of work being done, he is vice-principal of the master. 24 App. 458 (2) (101 S. E. 397).

Person employed as superintendent or foreman, having authority to supervise master's business and to employ and discharge employees and direct them in their work, is vice-principal or alter ego of master, and his negligence in discharge of such duties may be imputed to master. 24 App. 738 (1) (102 S. E. 167).

Who are fellow servants: Two employees in same service, subject to general control of master, are fellow servants, though employed in different departments, and so far removed from each other that one can not control conduct of other. 15 App. 33 (82 S. E. 586).

Employees of common master engaged in furtherance of general purpose of master's business are fellow

servants. 15 App. 108 (1) (82 S. E. 666).

Where two or more employees in same service are engaged in labor for furtherance of general purpose of business in which they contract to serve, and are subject to general control and direction of a common master, though employed in different departments of duty and so far removed from each other as that one can not in any degree control or influence conduct of other, they are nevertheless fellow-servants within meaning of this section. 22 App. 651 (2) (97 S. E. 114); 24 App. 494, 495 (3) (101 S. E. 392).

Where several employees in same service are engaged in labor in furtherance of general purpose of business in which they contract to serve, and are subject to general control and direction of common master, though employed in different departments of duty and so far removed from each other as that one can not in any degree control or influence conduct of another, they are nevertheless fellow servants. 24 App. 494, 495 (3) (101 S. E. 392).

§ 3130. (§ 2611.) Duty of master.

See general note following § 3131.

§ 3131. (§ 2612.) Duty of servant.

Cited. 13 App. 799, 816 (81 S. E. 269);
21 App. 262, 263 (94 S. E. 256).

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See general note on injuries to railroad employees following § 2787.

Appliances: See **Machinery and appliances.**

Assumption of risk: Servant assumes ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. 140/459 (2) (79 S. E. 130); 144/254, 255 (2) (87 S. E. 282).

Charge which so confined jury's attention to question of assumption of risk as to exclude consideration of other important issues was erroneous. 143/585 (2) (85 S. E. 707).

Demand for extraordinary diligence in emergency minimizes servant's assumption of risk, where emergency

entirely obscures that due care which ordinarily would impel exercise of instinct of self-preservation. 15 App. 191 (3) (82 S. E. 815).

Under section 3131 railroad employee accepts no risks arising from negligence of railroad or its employees. 15 App. 736 (1) (84 S. E. 206).

Assumption of risk is question for jury, and should not be decided by decision on demurrer, except in plain, indisputable cases. 15 App. 758 (4) (84 S. E. 161).

Ordinarily employee impliedly assumes usual risks incident to his employment. 16 App. 53 (1) (84 S. E. 328).

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Employee's assumption of risk may be abrogated by distinct order that he use dangerous appliance, accompanied by implied assurance that it is safe. *Id.*

That servant imprudently exposed himself in obeying master's order will not preclude him from recovering for injury directly traceable to some independent act of master, as to which servant was not chargeable with assumed risk. *Id.* 53, 54 (4).

Master's absolute and non-delegable duty to refrain from giving orders which will require servant to subject himself to injury from dangerous instrumentality. *Id.* 53, 54 (5).

That defendants' vice-principal directed plaintiff to perform particular act did not relieve plaintiff from legal consequences of assuming risk of obvious danger. 16 App. 668 (2) (85 S. E. 977).

Servant assumes ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. 146/300 (3) (91 S. E. 100); 23 App. 249 (97 S. E. 867); 18 App. 568, 569 (2) (90 S. E. 104); 22 App. 406 (2) (95 S. E. 1010).

Where petition discloses that injury received by plaintiff in defendant's service resulted from operation of natural law, effect of which plaintiff could estimate as well as master, and that he had equal means with master of knowing obvious danger incident to performance of his duties in place in which injury occurred and in which he was directed to work, he assumed the risk, notwithstanding such direction and assurance of safety given by master. 18 App. 117 (89 S. E. 158).

At common law, if injury resulted from one of the ordinary and usual risks of employment there could be no recovery. 19 App. 521, 522 (91 S. E. 898).

Employee is deemed to accept risk ordinarily incident to his employment, notwithstanding promise of his employer to furnish a necessary tool, where the danger is great, obvious, or immediate, such as a reasonably prudent man would not encounter. 19 App. 680, 681 (2) (91 S. E. 1060).

In order for servant to recover, it must appear that master knew or ought to have known of the danger, that plaintiff did not know and by exercise of ordinary care could not have known, and that he did not have equal means with master of knowing the danger. 20 App. 391 (93 S. E. 44).

Servant can not recover from master damages for injury caused by defect in machinery supplied him, or its antiquity of structure, where it appears that servant had means of knowledge equal to or better than those of the master as to such defects or antiquity, and, despite such knowledge, continued to work with such machinery. 20 App. 819 (1) (93 S. E. 495).

Servant assumes obvious risks of business about which he is engaged, but this does not ordinarily impose upon him burden of ascertaining by positive investigation if place where he is directed to work is safe, or make him responsible for what such investigation might reveal, but generally he assumes such risks only as would be obvious to person of ordinary intelligence and familiar with business; in absence of anything to suggest that place is dangerous, he may rely upon performance by master of duty to furnish reasonably safe place and to properly inspect it and preserve such safety. 21 App. 340 (3) (94 S. E. 649); 22 App. 26 (1-b) (95 S. E. 472).

Where it appeared, from allegations of petition, that servant must have known the facts charged as negligence of the master, there was no error in sustaining general demurrer and dismissing action. 21 App. 599 (94 S. E. 835).

While ordinarily law reads into contracts of employment agreement on servant's part to assume known risks of employment, so far as he has capacity to realize and comprehend them, yet this implication may be abrogated by express or implied contract to contrary. 22 App. 309, 310 (3) (96 S. E. 16).

Where servant complains to master that instrumentality appears to be dangerous, and thereupon master com-

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mands him to proceed with work and assures him there is no danger, unless danger be so obvious and manifest that no prudent man would expose himself thereto, law implies quasi new agreement whereby master relieves servant from former assumption of risks and places responsibility for resulting injuries upon master. 22 App. 309, 310 (3) (96 S. E. 16).

Where injury to servant was due to risk incident to character of work being done, he can not recover therefor. 22 App. 651, 652 (4) (97 S. E. 114).

Where it affirmatively appears from petition that, although defendant employer may have been negligent in furnishing plaintiff defective instrumentalities with which to work, his opportunities to discover their defective condition were equal, if not superior, to those of employer, it was not error to dismiss petition on demurrer, since defects were patent to superficial observation and were in fact observed by plaintiff before he was injured; also because injury was consequence of plaintiff's own negligence coupled with operation of natural law, effect of which he could estimate as well as the employer. 23 App. 552 (99 S. E. 44).

Where allegations of petition disclosed that injury received by plaintiff, who was foreman in charge of gang of workmen, in defendant's service resulted from operation of a natural law, effect of which plaintiff could estimate as well as master, and that he had equal means with master of knowing obvious danger incident to performance of duties in place in which injury occurred, he assumed the risk, and overruling of general demurrer to petition was error. 24 App. 494, 495 (1) (101 S. E. 392).

In action by servant for injury from injury from fall alleged to have been caused by turning of insecure board of step when plaintiff stepped upon it in descending steps of building in which she was working for defendant, where it did not appear from petition that defendant knew of such condition of step, and where petition alleged that plaintiff daily and con-

stantly used such steps when working in and about the premises, no cause of action was stated; it appearing that plaintiff had opportunities equal to those of defendant of knowing of defect in step. 24 App. 524 (101 S. E. 759).

Where petition in suit for damages for homicide of plaintiff's husband, who at time of death was employee of defendant, shows that plaintiff's husband had at least equal means with defendant of knowing that place in which he worked was unsafe, and that he voluntarily continued, and without objection, in master's service, it was not error to dismiss such petition on general demurrer. 24 App. 542 (101 S. E. 590).

While ordinarily law reads into contracts of employment an agreement on servant's part to assume known risks of employment, so far as he has capacity to realize and comprehend them, yet such implication may be abrogated by express or implied contract to contrary. 24 App. 739 (1) (102 S. E. 134).

See **Child**.

Blacksmiths: Evidence here sufficient to take to jury questions whether piece of iron that struck eye of blacksmith's helper came from the hammer, or from the anvil, or from the iron upon which he was working, and also whether the accident was caused by a defect in the hammer, or by the negligence of the blacksmith, who was a fellow-servant. 13 App. 571 (79 S. E. 487).

Burden of proof is on servant to show that he did not have equal means with master of discovering defects and dangers, and by exercise of ordinary care could not have known of them. 13 App. 618 (2) (79 S. E. 587).

Plaintiff, in addition to showing due care on his part, must show that he was not aware of danger, and that by ordinary care he could not have known of it. 16 App. 737 (4) (86 S. E. 82).

Adult servant will be presumed to know of dangers in machinery and of incompetency of fellow servants, after

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he has worked with them and machinery for reasonable time. *Id.* 737 (5).

Burden of proof is on plaintiff to show negligence of master and due care by injured servant, all presumptions being in master's favor. 17 App. 534 (1, 2) (87 S. E. 827).

Burden is upon plaintiff suing his master to show that master was negligent, under common law rules. 19 App. 521, 522 (91 S. E. 898).

Charge that case involves some of the doctrines of master and servant, and it becomes necessary for the court to give certain rules of master and servant that jury may understand such rules and know how to apply them, was not erroneous. 19 App. 554, 555 (4) (91 S. E. 923).

Where trial court had previously instructed jury that when the word "servant" was used in the charge they would understand that the same referred to the injured minor, it was error to instruct jury that "the law defines the duty of a servant as follows: A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself." 21 App. 315 (3) (94 S. E. 287).

Where court incorrectly charged as to liability for injuries to servant from concurrent negligence of plaintiff himself and a fellow servant, new trial will be granted, although in other and different portions of the charge the judge correctly charged the jury upon the question involved, but did not undertake to correct the erroneous charge given. 23 App. 354 (2) (98 S. E. 237).

Child: Evidence as to how employee was dressed was admissible to show whether defendant's superintendent was put on notice of deceased employee's youth. 143/762, 763 (3) (85 S. E. 922).

In action for injuries to child prior to Child Labor Law of 1906, while operating spinning machine, question whether machine was such that dangers were patent to her, and whether she was guilty of contributory negligence, were for jury. 15 App. 213 (2) (82 S. E. 921).

Master, employing child of tender years in dangerous occupation, must warn him of dangers incident thereto and also take additional precautions against child's forgetfulness and capability to appreciate danger. 17 App. 10 (2) (86 S. E. 260).

Charge that child, operating lap-winder machine, did not assume risk of ordinarily patent, obvious dangers, not within his capacity to appreciate, was proper. *Id.*

Charge that child was not chargeable with contributory negligence unless he failed to exercise care commensurate with his mental and physical capacity was proper. *Id.*

Charge in action for injuries to child that he could not recover if facts showed that injury could not have been received in manner alleged was properly refused. *Id.* 10 (4).

Evidence here was sufficient to support verdict for plaintiff. *Id.* 10 (5).

Infant employees over 14 years of age are presumed to assume risks which the law makes incident to their employment. 17 App. 410 (87 S. E. 149).

Petition which charged negligence by defendant in putting minor son of plaintiff's to work on engine equipped with defective brakes, and not equipped with railing around working platform, in employing unskilled, incompetent engineer to operate engine over defective track, and in failing to warn minor, who was inexperienced, of dangers, charged failure of master to perform duties incumbent on him. 268 Fed. 278, 279 (4).

Evidence here in action by boy of fifteen years for injuries received while operating a machine was sufficient to withstand motion for nonsuit. 146/240 (1) (91 S. E. 54).

Law recognizes distinction between master's duty to adult employee, and duty to employee who, from youth or inexperience or other mental immaturity or infirmity, is less able to understand or guard against perils to which he may be exposed in course of his employment. 21 App. 315 (2) (94 S. E. 287).

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Master owes to employee of tender years duty of taking such extra precautions against his forgetfulness of warnings and incapacity to appreciate dangers, and other natural childish tendencies, as will reasonably insure his safety as against even such dangers as might be obvious to an adult employee who is in exercise of ordinary care. 21 App. 315 (2) (94 S. E. 287).

Charge in action by child of tender years against employer for personal injuries that "in this case the law required of the master the exercise of ordinary care and diligence, and the failure to exercise such care and diligence would constitute negligence," was erroneous as it bound the master to exercise no more than ordinary diligence, notwithstanding tender years of plaintiff. 21 App. 315 (3) (94 S. E. 287).

Charge in action by child of tender years against employer for personal injuries that the master is in duty bound to exercise ordinary care in furnishing machinery equal in kind to that in general use and reasonably safe for all persons who operate it with ordinary care and diligence, was erroneous as binding master to exercise of no more than ordinary diligence, notwithstanding tender years of plaintiff. 21 App. 315 (3) (94 S. E. 287).

Charge which nowhere suggested that master owed any other duty than that of warning to a youthful employee, beyond duty of ordinary care which he would owe to an adult employee, was erroneous. 21 App. 315, 316 (3-b) (94 S. E. 287).

Petition in action by fifteen year old boy against employer, alleging that he was employed to operate a "twisting machine" in a cotton mill, that he attempted to clean machinery while in motion, with full knowledge that if he put his fingers in the revolving machinery and cogs, they would be mashed or cut off, and that he used a rag instead of his fingers, holding it in his hand to use it, and that such rag was caught by the machinery, and drew his hand into contact with the cogs, producing injury

complained of, showed that plaintiff's injury was result of his own lack of care. 21 App. 558 (2) (94 S. E. 821).

Where father hires minor son to employer to do certain work, and employer, without consent of father, puts son to more hazardous employment, and son is injured, father may sue employer in his own behalf for recovery of such diminution of son's earning capacity, between date of injury and date of attaining his majority, as injury may have occasioned. 23 App. 299 (1) (98 S. E. 192).

But where suit for damages is maintained in minor's own behalf, fact that employer might have changed work and duties of employment would not relieve plaintiff of duty to exercise that degree of intelligence, knowledge, and judgment actually possessed by him; proof of such change of employment would not of itself furnish ground of recovery where it appears that injury was brought about by plaintiff's own inexcusable negligence. 23 App. 299 (2) (98 S. E. 192).

It was not error to grant nonsuit in action for injuries to sixteen year old boy where he necessarily must have known that to place his hand within rapidly revolving open machinery, with which he was necessarily familiar, would be a dangerous act, and none of the alleged acts of negligence on part of master was substantiated by evidence of plaintiff. 23 App. 299, 300 (4) (98 S. E. 192).

Servant nineteen years old, of fair education and training, chargeable with same degree of diligence for own safety as adult engaged in same work. 23 App. 408 (1) (98 S. E. 419).

See **Pleading.**

Choice: Charge that where employee has choice of two ways of doing work, one safe and other dangerous, duty to his employer is to select safe way, and he can not recover if he selects dangerous way, although it does not amount to rashness, is erroneous. 144/253 (1) (86 S. E. 1083).

Where employee having choice of safe and unsafe way of doing work, selects latter when he knows or should know of danger, he can not re-

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cover for consequential injuries. 17 App. 684 (1) (87 S. E. 1089).

Employee in mill who in attempting to put belt on rapidly revolving pulley chose dangerous way of doing so was not entitled to recover for injuries thus received which he could have avoided by choosing safe way known to him, although his choice of the dangerous way may not have amounted to actual rashness. 24 App. 234 (100 S. E. 659).

Where one experienced in his business has choice of doing certain work by a safe or a dangerous way, he must select former, and if he voluntarily selects latter when he knows, or in exercise of due care should know, of the danger, he is guilty of lack of ordinary care. 24 App. 390 (2) (100 S. E. 800).

Contributory negligence being the cause of injuries to servant, he could not recover. 141/46 (2) (80 S. E. 290).

Servant necessarily so absorbed in performance of duty as to be incapable of using previous knowledge of existence of danger can not recover where it does not appear that injury was not caused by his own carelessness, or was result of danger assumed by him, in absence of emergency authorizing inference of self-forgetfulness. 15 App. 191 (2) (82 S. E. 815).

Contributory negligence is question for jury, and should not be decided by decision on demurrer, except in plain, indisputable cases. 15 App. 758 (4) (84 S. E. 161).

Court can never judicially declare that servant was contributorily negligent in obeying master's orders, unless risk was so great that it would not have been hazarded by any man of common prudence. 16 App. 53, 54 (2) (84 S. E. 328).

Where several conditions combine to produce injury, servant is not contributorily negligent, as matter of law, if he knew of only part of such conditions. Id. 53, 54 (3).

Employee may recover for injuries from using dangerous appliance under master's orders, unless he knew risk, and also that it will probably be attended by injury which could be avoided by due caution. Id.

Under evidence here question whether servant was negligent in obeying master's order after being assured by master that gun was safe was for jury. Id. 53, 54 (6).

Where it appeared that defects in electric appliances were as obvious to deceased employee as to defendant, that he understood the danger, and that his attempt to operate them, if such attempt were made, amounted to want of ordinary care, nonsuit was properly awarded. 17 App. 534 (2, 3) (87 S. E. 827).

Knowledge of servant that inspection of boiler had been recently made by another person, acting without authority from defendant but solely in behalf of a company which had insured boiler against explosion, did not justify him, in exercise of ordinary care for his own safety, in relying upon such inspection, or relieve him of legal consequences of his negligence in failing to discover defects in valve connected with the boiler which caused the injury. 20 App. 819, 820 (1-b) (93 S. E. 495).

Though master was negligent in not seeing that gang-plank was properly secured, court did not err in granting nonsuit where plaintiff himself testified that he could have discovered this by merely glancing at it before he stepped upon it. 23 App. 187 (4) (97 S. E. 865).

Master is not liable for injuries to servant resulting from negligence of servant himself. 23 App. 354 (2) (98 S. E. 237).

See **Burden of proof.**

Convict: Rule forbidding recovery by servant who subjects himself to injury by doing something known to be dangerous is inapplicable to convict whose movements are controlled by boss. 16 App. 96 (2) (84 S. E. 734).

Discharge of employees: See § 3588 and notes.

Elevator: Petition here in action by employee for injuries caused by falling into and through elevator shaft by reason of giving way of door or gate to elevator against which he was

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thrown by another employee was demurrable. 21 App. 322 (94 S. E. 286).

Emergency: Demand for extraordinary diligence in emergency wholly excuses servant's negligence, where emergency entirely obscures that due care which ordinarily would impel exercise of instinct of self-preservation. 15 App. 191 (3) (82 S. E. 815).

Employment of servants: See § 3588 and notes.

Evidence: Exclamation by deceased, "I didn't want to go out there!" was admissible to illustrate whether he voluntarily went to work at place in mill where he was injured. 143/762 (2) (85 S. E. 922).

Evidence in action wherein it was charged that defendants were negligent in not furnishing properly tempered tools, sufficient light, and safe place to work, sustained verdict for defendant. 144/390 (1) (87 S. E. 397).

Evidence in action by servant for injuries received when water tank fell upon his foot held so confused and contradictory that nonsuit was properly entered. 146/288 (91 S. E. 61).

Evidence in action for personal injuries to servant engaged in toggling logs held to warrant grant of nonsuit. 21 App. 262 (94 S. E. 256).

Testimony that, after injury, supporting pillars were put under car which had fallen and injured plaintiff was properly rejected. 24 App. 722 (4) (102 S. E. 184).

Inspect: Master is not chargeable with negligence because appliance was not inspected so as to discover that it was not suited for unintended use. 15 App. 652 (1) (84 S. E. 149).

Master by constant inspection should discover changes from gradual wear and tear of machinery. 16 App. 96 (4) (84 S. E. 734).

Charge that it was for jury to say whether any inspection was made, or could have been made, and whether or not defendant exercised ordinary care and diligence in seeing to keeping of its premises in safe condition, was not error. 22 App. 155 (1-b) (95 S. E. 765).

Jury: Plaintiff's evidence showing that injuries were due either to negli-

gence of fellow servant or to patent defects in machine, and that he had equal means with master of knowing of such defects or dangers, nonsuit was proper. 13 App. 618, 619 (4) (79 S. E. 587)..

Where plaintiff alleged three distinct grounds of negligence and proof was sufficient to sustain finding for plaintiff on any one ground, error to grant nonsuit. 14 App. 139 (4) (80 S. E. 667).

Negligence is question for jury and should not be decided by decision on demurrer, except in plain, indisputable cases. 15 App. 758 (4) (84 S. E. 161).

While questions of negligence, including question whether plaintiff by use of ordinary care could have avoided being injured, are for jury to determine, yet where finding of jury on such issues is not supported by any evidence, such finding should be set aside and new trial granted. 21 App. 379, 380 (6) (94 S. E. 661).

Refusal to give instructions as to what would constitute negligence is not error, that being peculiarly a question for the jury. 23 App. 347 (8) (98 S. E. 248).

Whether car under which plaintiff was shoveling dirt when it fell and injured him was negligently propped up, and whether giving of order by foreman constituted negligence, were questions for jury, and court erred in granting nonsuit. 24 App. 722 (5) (102 S. E. 184).

Whether employer's order to engineer of log train to help unload, after engineer had told him that he knew nothing about such work, and was afraid that a skidway was unsafe, was a negligent one, was for jury. 24 App. 739, 740 (2) (102 S. E. 134).

Whether employer's order to engineer of log train to help unload, after engineer had told him that he knew nothing about such work and was afraid that skidway was not safe, in view of employer's assurance that there was no danger, was one which was itself so obviously dangerous that no one of ordinary prudence could be expected to perform it was question

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for jury. 24 App. 739, 740 (2) (102 S. E. 134).

See **Contributory negligence, Warn.**

Latent defect: Where there was no evidence to support allegations of petition as to latent defects in machinery or failure of defendant to employ competent servants, it was error to give in charge section 3130. 144/716 (1) (87 S. E. 1029).

See **Inspect, Machinery and appliances, Warn.**

Lineman: Electric-light company was liable for injuries to lineman from rotten condition of pole, which it permitted him to climb without warning him of the defect. 143/72 (1) (84 S. E. 436).

Machinery and appliances: Adult servant of ordinary intelligence who has worked on machine long enough to discover patent defects and dangers will be presumed to know of such defects or dangers. 13 App. 618 (2) (79 S. E. 587).

Under rulings of Supreme Court of South Carolina term "appliance" included human agencies. 14 App. 139 (3) (80 S. E. 667).

Ordinary diligence requires that master furnish appliances reasonably suited for uses intended, but not for unintended uses to which they may be casually or unexpectedly applied. 15 App. 652 (1) (84 S. E. 149).

Duty of master to furnish servants safe appliances for work in which they are engaged. 15 App. 790 (1) (84 S. E. 230).

Must appear in suit for injuries from defects or dangers in machinery that employer knew or ought to have known of defects or dangers, and also that employee did not know and had not equal means of knowing such fact, and by exercise of ordinary care could not have known thereof. 17 App. 534 (1) (87 S. E. 827).

Employer will be presumed to have had no notice or knowledge of appliances shown to have been defective. 17 App. 684 (2) (87 S. E. 1089).

Employer need not procure best and safest machinery which can be made, but need procure only kind in general use and reasonably safe if

operated with ordinary care. Id. 684 (3).

That machinery was not best obtainable did not authorize inference of negligence in its purchase and selection. Id.

Where plaintiff had been for about thirty years employed by defendant in same work in which he was engaged when injured, and he knew of defective appliances furnished him, and of danger in attempting to work with them, and there was no promise from master to furnish other and safer appliances, the master was not liable for injuries sustained by the servant, though in answer to plaintiff's complaint that he did not have proper tools, another servant, who was boss of room in which plaintiff was working, "said for us to do it." 18 App. 173, 174 (2) (88 S. E. 1009).

If defect in tool or appliance furnished servant by master should have been known to master, he will be presumed to have known it. 19 App. 554 (2) (91 S. E. 923).

Duty of furnishing reasonably safe machinery and of inspecting to find latent defects and dangers therein rests upon master, and servant is not bound by law to detect latent defects, or such as would be disclosed only by positive and careful investigation and would not be manifest to person of ordinary intelligence or experience in line of work in which servant was engaged. 22 App. 26 (1-a) (95 S. E. 472).

Master is not liable for injuries sustained in consequence of defect in tool which servant was using, when defect was such that it was known to servant or could have been known by exercise of ordinary care. 23 App. 408 (2) (98 S. E. 419).

See **Scaffold.**

Minor: See **Child.**

Non-assignable duties: Among non-assignable duties of master are providing machinery and appliances, place to work, inspection and repair of premises and appliances, selection and retention of servants, establishment of proper rules and regulations, and

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instruction of servants. 19 App. 554 (2) (91 S. E. 923).

Nonsuit: See **Jury**.

Order: Direct order of master to do act in performance of which servant is injured may excuse servant from exercising that degree of caution which would otherwise be required of him. 15 App. 758 (2) (84 S. E. 161).

In order for servant to recover for injury on ground that it resulted from compliance with direct order of master, or of his master's representative, servant must show that order was negligent under circumstances; if order was negligent, and servant knew of peril of complying with it, or if he had equal means with master of knowing of peril, or by exercise of ordinary care might have known thereof, he can not recover for injury received in complying with order. 146/279 (2) (91 S. E. 52); 19 App. 524 (91 S. E. 917).

Where servant is adult of ordinary intelligence, with knowledge equal if not superior to that of master as to ordinary risks of employment, he is bound to exercise his own skill and diligence to protect himself, and can not be relieved therefrom because of master, or his representative, were abrupt and peremptory, or because of fear of losing employment, or because he did not have time to reflect. 146/279, 280 (3) (91 S. E. 52).

Servant is not obligated to obey master's command to do work in dangerous manner or with defective machinery or appliances, if danger or defect is known to servant, or is so patent and obvious that by exercise of ordinary care he ought to have known of it. 18 App. 173 (1) (88 S. E. 1009).

Direct and immediate order of master will not justify servant in rashly exposing himself to a known and obvious danger; and if, in compliance with such order, servant be injured, he can not recover of master. 21 App. 379, 380 (4) (94 S. E. 661).

Even direct and immediate order of master will not justify servant in rashly exposing himself to known and obvious danger; and if, in compliance with command in such cases, servant

be injured, he can not recover of master therefor. 22 App. 309, 310 (2) (96 S. E. 16).

Where servant, although an adult and fully cognizant of his general duty in reference to machine, and aware of dangers ordinarily incident to its operation, obeys direct order of servant authorized by his master to give the direction, in reference to mode and manner of operating machine, and injury results, master is liable, provided act required to be done is not so obviously dangerous that no reasonably prudent man would undertake to perform it. 22 App. 309, 310 (2) (96 S. E. 16).

In order for servant to recover on ground that injury resulted from compliance with direct order of master, or of master's representative, servant must show that order was negligent one. 23 App. 334 (1) (98 S. E. 241).

Under evidence here it can not be held as matter of law, that dangers incident to work in which plaintiff was engaged and which he had been ordered to do by defendant's foreman, who knew that he was inexperienced, were so obvious as to preclude recovery by him. 24 App. 722 (5) (102 S. E. 184).

Master is negligent and responsible to servant for injuries resulting proximately therefrom if by his order he caused servant to do an act which exposed him to danger known to master but unknown to servant. 24 App. 738 (2) (102 S. E. 167).

A servant is bound to obey command, when given as such by master, if it pertains to duties of servant's employment and does not involve violation of law, and if act required is not one which is of itself so obviously dangerous that no person of ordinary prudence could be expected to perform it. 24 App. 739 (1) (102 S. E. 134).

Where servant complains that instrumentality or place appears to be dangerous, and master commands him to proceed with the work and assures him that there is no danger, then, unless danger is obvious and manifest, law implies quasi new agreement, whereby master relieves servant from his

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former assumption of risk. 24 App. 739 (1) (102 S. E. 134).

Ordinary diligence is variable term, and is such diligence as is adjusted to and befits circumstances which require exercise of reasonable care, foresight and prudence. 14 App. 35 (81 S. E. 387).

Both the master and the servant must exercise ordinary care, which is the only degree of care prescribed by law. 21 App. 603 (4) (94 S. E. 855).

Pleading: Petition alleging that deceased, a minor, was hired to work in a mill—a safe place—but that he was forced by defendant and its agents to leave the safe place and to work in place of danger around vats of scalding water, where, owing to the negligent conduct of defendant and its agents, he lost his life, was sufficient to withstand general demurrer. 140/405 (78 S. E. 1091).

Petition here in action by minor against his employer, with amendment thereto, set forth cause of action as against demurrer. 143/131 (84 S. E. 541).

Petition was not subject to general demurrer for failure to expressly allege that employer knew or should have known of defect, where it was alleged impliedly. 143/259 (1) (84 S. E. 584).

Petition here in action for death of employee for negligence in failing to furnish him safe place in which to work did not state cause of action. 144/254, 255 (3) (87 S. E. 282).

Petition here in action against fair association for injuries to plaintiff's son from being struck by missile did not show negligence of defendant. 144/773, 774 (1) (87 S. E. 1033).

Petition here in action for injuries to plaintiff's son did not state cause of action on theory of employment of son in dangerous occupation without her consent. *Id.* 773, 774 (2).

Petition in action for death of riveter, due to plank on which he was standing being insecurely fastened, charging that defendant was negligent in failing to provide safe place to work and to make proper inspection, and with knowingly retaining incom-

petent superintendent, was not demurrable; amendments here were properly allowed. 14 App. 35 (81 S. E. 387).

Petition here was not subject to general demurrer, but was subject to special demurrers filed. 17 App. 530 (1, 2) (87 S. E. 816).

Where plaintiff relies on employer's failure to furnish safe place to work, he must plead, not only that employer knew or should have known of danger, but that servant did not know, or have equal means with employer of knowing, such fact, and with ordinary care could not have known it. 17 App. 577 (1) (87 S. E. 834).

Petition in action by minor wagon driver employed by defendant for injuries caused by wheel coming off wagon, due to defendant's not supplying plaintiff with a wrench, held to state a cause of action. 19 App. 680 (1) (91 S. E. 1060).

Petition alleging master's negligence, in rule whereby only four laborers should store lumber, in not having additional man, in requiring fellow laborer to leave him alone to hold end of stick, and it fell, injuring him, did not show injury attributable to master's negligence. 19 App. 681 (91 S. E. 1063).

Petition in action by timekeeper and keeper of stores at work performed by defendant company in constructing concrete floor of certain warehouse, for personal injuries caused by stepping on nail sticking through a board point upward, held not to set forth cause of action. 19 App. 714 (91 S. E. 1063).

Petition here in action by employee of city for personal injuries held to set forth cause of action. 20 App. 822 (93 S. E. 541).

Where petition alleging that duties of plaintiff in certain mill required him to go daily to that mill from his place of work in another mill did not set out what such duties were, overruling of special demurrer calling for such information was error. 22 App. 180 (1) (95 S. E. 749).

Petition which fails to show that negligence of defendants, as charged

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therein, was cause of injury sued for, sets forth no cause of action and may be properly dismissed on demurrer. 23 App. 464 (98 S. E. 401).

Petition in action against owner of building, prospective tenant thereof, and contractor employed to make certain alterations therein alleging that owner retained possession and control of the building, that the contractor and prospective tenant each severally requested petitioner to go to the building and there to make an estimate of cost of certain work, that petitioner went to the building for purpose of making estimate and fell into hole which defendants negligently failed to guard, etc., failed to show breach of any duty which contractor owed petitioner and was demurrable. 23 App. 465 (98 S. E. 359).

Petition here in action for injuries caused by rip-saw, defects in which caused a plank to kick back throwing plaintiff's left hand on the saw, etc., was good as against general grounds of demurrer. 23 App. 702 (1) (99 S. E. 223).

Petition, alleging that defendant city employed plaintiff with knowledge of his inexperience, that he was told to climb electric light pole and attach loose end of wire he carried to another wire, that his hand and the loose end touched two wires entwined about the pole, causing shock and injury, with other allegations, stated cause of action. 24 App. 477 (101 S. E. 314).

Original declaration in attachment here, by which it was sought to recover for personal injuries received by plaintiff while employed in defendant's plant, set out cause of action under section 3910 of the Code of Alabama, particularly under subsections 2, 3 and 4. 24 App. 671 (1) (101 S. E. 809).

Second count of declaration here in action by servant, injured while at work when heavy casting fell and struck him, added by amendment, set out cause of action under common law. 24 App. 671, 672 (2) (101 S. E. 809).

Petition here in action by employee against employer for injuries received while operating molding machine set

out cause of action and was not subject to demurrer. 24 App. 690 (101 S. E. 917).

Proximate cause: Petition here did not show that injury proximately resulted from any negligence of defendant. 144/773, 774 (1) (87 S. E. 1033).

What particular act or circumstance was proximate cause of alleged injury must be submitted to jury; fact that plaintiff was injured by improper order of fellow servant is not ground for nonsuit when it is issuable whether proximate cause or injury was negligence of fellow servant or that of defendant. 14 App. 139 (1) (80 S. E. 667).

While master may be liable for injury to servant resulting from master's negligence, although master, in exercise of ordinary care, could not have foreseen that negligence would result in injury of particular kind produced, or in particular servant being injured, he can not be held liable unless injury was natural and probable result of his negligence; he is not liable unless, by exercise of ordinary care and diligence, he could have reasonably apprehended that his negligence would or might result in injury to some one of his servants. 23 App. 476 (98 S. E. 408).

Repair: Master who discovers changes from gradual wear and tear of machinery should repair them. 16 App. 96 (4) (84 S. E. 734).

Safe place: Rule requiring master to furnish servant safe place in which to work does not apply to such places as are constantly shifting and being transformed as direct result of servant's labor, and where work in its progress necessarily changes character for safety of place in which it is performed as it progresses. 140/459 (1) (79 S. E. 130); 144/254 (1) (87 S. E. 282); 17 App. 577 (1) (87 S. E. 834).

Master's duty to furnish his servants a safe place in which to work is a continuing one. 13 App. 799 (5) (81 S. E. 269).

While riveter employed to work on swaying framework assumes all risks reasonably incident to employment,

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duty of master to exercise greater degree of diligence in providing safe place to work than in case of work not attended with danger. 14 App. 35 (81 S. E. 387).

Charge that master is bound to exercise ordinary care to provide safe place of work is inaccurate, where it fails to qualify word "safe" by word "reasonably;" omission of qualifying word here was not reversible error. 17 App. 10 (1) (86 S. E. 260).

Such instruction was not misleading, where qualifying word was incorporated in subsequent part of charge. *Id.*

General rule of law declaring duty of master in regard to furnishing servant safe place to work is usually applied to permanent place, or one which is quasi permanent. 146/300 (4) (91 S. E. 100); 23 App. 249 (97 S. E. 867).

Obligation of master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in safe condition at every moment of their work, so far as its safety depends on due performance of that work by them and their fellow servants. 146/300 (4) (91 S. E. 100); 23 App. 249 (97 S. E. 867).

General rule of law declaring duty of master in regard to furnishing safe place to work is usually applied to permanent place or one quasi permanent; it does not apply to such places as are constantly shifting and being transformed as direct result of servant's labor, and where work in its progress necessarily changes character for safety of place in which it is performed, as it progresses. 18 App. 568 (1) (90 S. E. 104).

General rule of law that it is duty of master to exercise ordinary care and diligence in providing reasonably safe place of work for servants does not apply where very work for which servant is employed is of such nature that its progress is constantly changing the conditions as regards increase or diminution of safety; hazards thus arising must be regarded as being or-

dinary dangers of employment, and servant necessarily assumes them. 21 App. 379 (1) (94 S. E. 661).

Where servant was hired for express purpose of assisting in repair, demolition, or alteration of some instrumentality, and unsafe conditions from which injury resulted arose from or were incidental to work undertaken by him, general rule of law that it is duty of master to exercise ordinary care and diligence in providing reasonably safe place of work for his servants is not applicable. 21 App. 379 (1) (94 S. E. 661).

Charge that servant can rely upon performance of duty of furnishing safe place in which to work, and that danger arising from unsafe place is not included within risks assumed by servant, was not error. 22 App. 155, 156 (1-c) (95 S. E. 765).

General rule of law declaring duty of master in regard to furnishing servant safe place to work is usually applied to permanent place, or one which is quasi permanent; does not apply to such places as are constantly shifting and being transformed as direct result of servant's labor, and where work in its progress necessarily changes character for safety of place in which it is performed, as it progresses. 22 App. 406 (1) (95 S. E. 1010).

Demurrer to petition in action for homicide of plaintiff's son, alleged to have been caused by negligence of defendant in failing to furnish him a safe place in which to work, held properly sustained. 22 App. 406 (3) (95 S. E. 1010).

Servant assumes ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself; general rule of law requiring master to furnish safe place to work is usually applied to permanent place, or one which is quasi permanent; obligation of master to provide reasonably safe place does not oblige him to keep places where servants are employed in safe condition at every moment of their work, so far as its safety depends on due performance of that work by them and their fellow-serv-

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ants. 22 App. 651 (3) (97 S. E. 114); 24 App. 494, 495 (2) (101 S. E. 392).

Master must furnish to servants in his employ safe appliances for their labor, and a reasonably safe place in which to work. 23 App. 187 (1) (97 S. E. 865).

Obligation of master to furnish servants in his employ reasonably safe place in which to work does not require him to keep the place where they are employed in a safe condition at every moment of their work, so far as its safety depends on due performance of that work by them and their fellow servants. 23 App. 187 (2) (97 S. E. 865).

See **Pleading.**

Scaffold: Whether scaffold furnished by master was equal in kind to that in general use was not shown by testimony that it was "about the same scaffold as that in general use by the three concerns" that witness had worked for. 16 App. 686 (1) (85 S. E. 978).

Charge here was erroneous as incorrectly stating contentions in action for injuries to employee. *Id.* 686 (3).

Charge to determine whether defendant or its agent knew of defect in scaffold if it was defective was erroneous for failure to tell jury to ascertain whether master by ordinary care ought to have known of defect. *Id.* 686 (4).

Charge that if servant "about the time he was going in and upon the scaffold," told foreman it was defective, and foreman told him to go ahead and do the work, master would be liable, was erroneous. *Id.* 686 (5).

Evidence in behalf of plaintiff, that, after collapse of scaffold, resulting in death of her son, defendant took additional precautions in rebuilding of scaffold, was properly rejected, although offered in rebuttal of contention that defendant had provided him with scaffold equal to those in general use and reasonably safe. 19 App. 201 (2) (91 S. E. 275).

Where evidence showed that servant knew of defect in scaffold, complained thereof to master, and was assured that place was safe, charge that if jury be-

lieved that scaffold was negligently built, and that plaintiff was ordered to go upon such scaffold, with assurance that it was safe, and that such assurance was a negligent order or invitation to do the work, and that if plaintiff knew of the defect, or had equal means of knowing of same, if there was any, then plaintiff should have verdict, was error. 19 App. 201 (3) (91 S. E. 275).

Scope of employment: Mill employee, persisting in attempt to open sliding door after it had become fastened, injured by falling of roller, was not acting beyond scope of employment. 144/234, 235 (3) (86 S. E. 1092).

Selection: Servant can not recover for injuries from incompetency of fellow servant, if he by ordinary care could have known of such incompetency. 16 App. 737 (2) (86 S. E. 82).

One who complains of injuries from incompetency of fellow servant must overcome by direct proof presumption that master exercised ordinary diligence in selection. *Id.* 737 (3).

Incompetency of fellow servant must be established by plaintiff as fact, and not by inferences. *Id.*

Master owes to each servant duty to exercise ordinary care in selection of other servants engaged in same enterprise, and not to retain them after knowledge of their incompetency. 21 App. 603 (2) (94 S. E. 855).

Servant injured by fellow servant must show, in order to recover of master, that fellow servant was incompetent, that injury resulted directly or proximately from such incompetency, that master knew of such incompetency or by exercise of ordinary care could have known of it, that injured servant did not know of such incompetency, that by exercise of ordinary care he could not have known of it, and that he did not have equal means with master for acquiring knowledge of such fact. 21 App. 603 (3) (94 S. E. 855).

If master has exercised ordinary care, and has neither employed nor retained alleged incompetent servant with knowledge of such incompetency, he is not liable for injury to servant

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caused by act of such fellow servant. 21 App. 603 (4) (94 S. E. 855).

Specific complaints by master, or by master's alter ego to servant whose incompetency is alleged cause of injury in controversy, or by other persons to the master concerning that servant, may be proved upon issue as to whether or not servant was in fact incompetent as alleged by plaintiff, and especially to show master's knowledge of his incompetency. 21 App. 603 (7) (94 S. E. 855).

Where issue is whether master knowingly employed or retained incompetent servant, not error to allow plaintiff to prove that servant had long borne in the community of the master's place of business a general reputation for incompetency in the particular line of work in which he was employed by the master on the occasion in controversy. 21 App. 603, 604 (8) (94 S. E. 855).

Master and injured servant are equally chargeable with knowledge that is general, and burden of proof being upon injured servant to show that he was without knowledge, as well as that defendant employer did have knowledge, of incompetency of fellow servant, such evidence would seem to militate more strongly against plaintiff than the defendant, and defendant will not, therefore, be heard to complain of admission of such evidence. 21 App. 603, 604 (8) (94 S. E. 855).

It was error to charge that if servant was incompetent and master knew it, or could by exercise of ordinary care have discovered it, master would be liable for injury to servant caused by his negligence, provided injured servant did not know of his incompetency or had not equal means with master of knowing such facts, or could not by exercise of ordinary care have discovered it, and provided further injured servant would be otherwise entitled to recover under the law. 21 App. 603, 604 (9) (94 S. E. 855).

In suit by servant for personal injuries arising from negligence of master in failing to comply with duties set

forth in section 3130, it must appear that master knew or ought to have known of incompetency of other servants, or of defects or danger in machinery supplied, and it must also appear that injured servant did not know and did not have equal means of knowing such fact, and by exercise of ordinary care could not have known thereof. 21 App. 379 (2) (94 S. E. 661).

Variance: No variance here in action for injuries to child while operating machine, as to manner of injury. 17 App. 10 (3) (86 S. E. 260).

Warn: Where danger of coming into proximity to shafting was obvious to an adult servant, not incumbent on master to give him warning with respect thereto. 13 App. 273 (79 S. E. 85).

Master must warn servant only when he knew or ought to have known of the danger and the servant did not know and did not have equal means of knowing such fact, and by exercise of ordinary care could not have known it. 13 App. 618 (1) (79 S. E. 587).

Master who discovers changes from gradual wear and tear of machinery should warn servants of their existence. 16 App. 96 (4) (84 S. E. 734).

Where inexperienced servant was not warned of danger not open to observation, question whether servant, who was killed, was in exercise of ordinary care, was for jury. 17 App. 113 (3) (86 S. E. 388).

Where danger incident to employment was obvious and as easily known to servant as to master, latter will not be liable for failing to give warning to servant. 21 App. 379, 380 (5) (94 S. E. 661).

Charge that if there are latent defects in construction of place of work which are, or in exercise of ordinary care could be, known to the master, and which are unknown to the servant, it is duty of master to warn servant thereof, was not error. 22 App. 155, 156 (1-d) (95 S. E. 765).

Where danger is so patent and obvious that it must necessarily be as easily known to servant as to mas-

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ter, latter is not liable for failure to give warning. 23 App. 299, 300 (3) (98 S. E. 192).

Duty of master to warn servant of dangers incident to employment does not embrace obligation to anticipate

that servant may perform task improperly, and to warn him of obvious danger resultant from such improper method of performing task. 23 App. 408 (3) (98 S. E. 419).

See **Child**.

§ 3132. (§ 2613.) **Contracts exempting master from liability for his negligence, void.**

Cited. 22 App. 1, 4 (95 S. E. 368).

§ 3133. (§ 2614.) **Term of employment.**

Expenses: Prior to legal termination of contract of employment under which employer was liable for expenses incurred by employee in taking orders, employer who continued to direct employee in further taking of orders, after orally informing him that his territory was so disposed of to another as to prevent filling of orders, was liable for expenses. 19 App. 248, 249 (5) (91 S. E. 284).

Labor unions: Where manufacturer employing skilled laborers, under contracts terminable at will, makes rule that no person belonging to labor union shall be employed, and that employee joining union shall immediately cease to be employed, which rule is promulgated and assented to by employees impliedly by continuing to work, or expressly, employer has contractual status with employees so assenting. 149/119 (1) (99 S. E. 300).

New contract: There was no error in admitting testimony wherein witness for plaintiff testified that defendant employer denied existence of new and in-

consistent contract. 19 App. 248, 249 (4) (91 S. E. 284).

Notice: Stipulation in written contract of employment that the "arrangement may be terminated at end of any month by either party giving written notice to the other party" is not complied with by employer sending to employee letter in which making of new and different contract with him is clearly contemplated, and in which employer states that in his opinion it would be advisable to proceed on the old contract for thirty days longer. 19 App. 248 (1) (91 S. E. 284).

Where on later date employer notifies employee that intention of former notice was to terminate contract, but employer afterwards continues to treat employee as his employee and to hold him out as such to others, and, with knowledge and under direction of employer, employee continues to perform duties, and employer continues to accept benefit of services rendered, latter notice can not be held to be binding upon employee. *Id.* 248 (2).

§ 3134. **Wages of deceased employee paid to widow, minors, or guardian.** It shall be lawful upon the death of any person employed by any railroad company or other corporation doing business in this State, who may have wages due him by said railroad company or other corporation, and who shall leave surviving him a widow or minor child or children, to pay all of said wages when they do not exceed [three hundred dollars,] (a) and, in case such wages exceed [three hundred dollars,] (a) to pay the sum of [three hundred dollars] (a) thereof to the surviving widow of such employee; in case he has no surviving widow, but leaves surviving a minor child or children, then said sum shall be paid to said minor child or children without any administration upon the estate of said employee, and

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said funds to the amount of [three hundred dollars] (a) after the death of said employee is hereby exempt from any and all process of garnishment.

Acts 1901, p. 60. 1898, p. 91. (a) Acts 1915, p. 21.

§ 3136 (a). **Semi-monthly payment of wages; insolvency as defense; extension of time.** [Commencing after a period of three months from the passage of this law, every person, firm or corporation, including steam and electric railroads, but not including farming, saw-mill and turpentine inindustries, employing wage-workers, skilled or unskilled, engaged in manual, mechanical or clerical labor, including all employees, except officials, superintendents, or other heads or sub-heads of departments, who may be employed by the month or year at stipulated salaries, shall make payments in lawful money, or checks, of the United States to said employees, laborers and workers or to their authorized representatives; such payments to be made on such dates during the month as may be decided upon by such person, firm or corporation, provided, however, that such dates as may be selected shall amount to an equal division of the month in respect to the time of payments, the full net amount of wages or earnings due said employees, laborers and wage-workers, and in case any such employer shall refuse or willfully fail to make payments when demanded, upon the regular days of payment, to such wage-earner, said employer, the members of the firm, the directors, officers, and superintendents or managers of corporations and associations shall, upon conviction, be sentenced to pay a fine not exceeding two hundred dollars, provided no person, firm or corporation is not in a financial condition to pay said wages. or salary, but insolvency shall be the only defense to an indictment for such an offense, and an extension of time within which to pay said wages or salary shall operate to make the offense under this law to be committed on date last agreed upon for payment of same.]

Acts 1919, p. 388.

This law was passed August 4, 1919.

ARTICLE 4.

Child Labor Regulated.

§ 3149 (a). **No child under fourteen years of age to be employed; exceptions.**

Cited. 148/1, 15 (95 S. E. 698).

Assumption of risk: Defense of assumption of risk by minor is excluded by this section. 140/727 (2) (79 S. E. 836).

Contributory negligence: Defense that child was guilty of such negligence as to prevent recovery is open to defendant. 140/727 (4) (79 S. E. 836).

If minor is not guilty of such neg-

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ligence as will prevent recovery, but is guilty of some negligence, doctrine of diminution of damages may be invoked. *Id.* 727 (4-a) (79 S. E. 836).
Negligence per se: Employment of minor under prescribed age is negligence per se, and right of action arises in its favor for injuries proximately resulting from the employment. 140/727 (1) (79 S. E. 836).

Prior: Opinion in case for injuries to child prior to Child Labor Law of 1906. 15 App. 213 (82 S. E. 921).

Proximate cause: Where injury is not result of employment, but of some wholly independent cause disconnected from the employment, there can be no recovery. 140/727 (3) (79 S. E. 836).

ARTICLE 6.

Workmen's Compensation.

§ 3154 (a). [This law shall be known as the Georgia Workmen's Compensation Act.]

Acts 1920, p. 167.

§ 3154 (b). **"Employer" and "employee" defined. Basis for computing compensation. "Injury" and "personal injury" defined.** [Unless the context otherwise requires:

(a) "Employers" shall include any municipal corporation within the State, and any political division thereof, and any individual firm, association or corporation engaged in any business operated for gain or profit, except as hereinafter excepted, and the receiver or trustee of the same, and the legal representative of a deceased employer, using the service of another for pay. If the employer is insured, it shall include his insurer so far as applicable.

(b) "Employee" shall include every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade, business, occupation or profession of the employer and, except as hereinafter set out. Minors are included even though working in violation of any child labor law or other similar statute, provided that nothing herein contained shall be construed as repealing or altering any such law or statute. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representatives, dependents and other persons to whom compensation may be payable, pursuant to the provisions of this law.]

(c) The basis for computing the compensation provided for in this law, shall be as follows:

(1) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings if in the employment of the same employer continuously during the year next preceding the injury.

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(2) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

(3) If the injured person has not been engaged in the employment of the same employer for the full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same employment and same location, (or if that be impracticable, of neighboring employments of the same kind) have earned during such period.

(4) As to employees in employments in which it is the custom to operate throughout the working days of the year, the annual earnings, if not otherwise determinable, shall be regarded as 300 times the average daily earnings in such computations.

(5) As to employees in employments in which it is the custom to operate for a part of the whole number of working days in each year, such number, if the annual earnings are not otherwise determinable, shall be used instead of 300 as a basis for computing the annual earnings: Provided, the minimum number of days which shall be so used for the basis of the year's work shall not be less than 200.

(6) In the case of injured employees who earn either no wages or less than the earnings of adult day laborers in the same line of employment in that locality, the yearly wage shall be reckoned according to the average annual earning of adults of the same class in the same (or if that is impracticable then of neighboring) employments.

(7) Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment and shall exclude overtime earnings. The earnings shall not include any sum which the said employer has been accustomed to pay the employee to cover any special expense entailed on him by the nature of his employment.

(8) To determine the amount of compensation for each installment period, the amount per annum shall be ascertained pursuant hereto, and such amount divided by the number of installment periods per annum.

(d) "Injury" and "personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident, nor shall "injury" and "personal injury" include injury caused by the wilful act of a third person directed against an employee for reasons personal to such employee or because of his employment.

(e) In all claims for compensation for hernia resulting from injury by accident arising out of and in the course of the employee's employment,

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it must be definitely proven to the satisfaction of the industrial commission: First, that there was an injury resulting in hernia; second, that the hernia appeared suddenly; third, that it was accompanied by pain; fourth, that the hernia immediately followed an accident; fifth, that the hernia did not exist prior to the accident for which compensation is claimed. All hernia, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in course of the employment, shall be treated in a surgical manner by radical operation. If death result from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provision of section 3154 (ll). In non-fatal cases, time loss only shall be paid, unless it is shown by special examination, as provided in section 3154 (bb), that the injured employee has a permanent partial disability resulting after the operation. If so, compensation shall be paid in accordance with the provisions of section 3154 (ll) with reference to partial disability. In case the injured employee refuses to undergo the radical operation for the cure of said hernia, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that the commission considers it unsafe for the employee to undergo said operation, the employee shall be paid as provided in section 3154 (ee).]

Acts 1920, p. 167.

§ 3154 (c). **Pending legislation.** [The provisions of this law shall not effect pending litigation.]

Acts 1920, p. 171.

§ 3154 (d). **Exemption. Notice to reject.** [Every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this law respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless prior to any accident resulting in injury or death, notice to the contrary shall have been given in the manner herein provided, and in substantially the following form, to wit:

EMPLOYERS' NOTICE TO REJECT.

To the Employees of the Undersigned, and the Industrial Commission of Georgia:

You and each of you are hereby notified that the undersigned rejects the terms, conditions and provisions to provide, secure and pay compensation to employees of the undersigned for injuries received as provided in that Act of the General Assembly of Georgia, known as the Georgia Workmen's Compensation Act, and elects to pay damages for personal

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injuries received by such employees under the common law and statutes of this State, as modified by the provision of said Workmen's Compensation Law.

(Signed)

State of Georgia,

County of

The undersigned being first duly sworn deposes and says that a true, correct and verbatim copy of the foregoing notice was, on the day of 19...., posted at (state fully place where posted.)

Sworn to and subscribed before me this day of 19....

.....Notary Public.

EMPLOYEES' NOTICE TO REJECT.

To (name of employer) and the Industrial Commission of Georgia :

You and each of you are hereby notified that the undersigned hereby elects to reject the terms, conditions and provisions of an Act of the General Assembly of Georgia for the payment of compensation known as the Georgia Workmen's Compensation Act, and elects to rely upon the common law as modified by the statutes of this State and by the provisions of said Act for the right to recover for any personal injury which I may receive growing out of and arising from said employment while in the line of duty for my employer above named.

Dated this day of 19....

(Signed)

State of Georgia,

County of

The undersigned being first duly sworn deposes and says that the above and foregoing written notice was on the day of 19...., served on the within named employer of the undersigned by delivering to (state name of person served) a true, correct and verbatim copy thereof.

Sworn to and subscribed before me this day of 19....

.....Notary Public.]

Acts 1920, p. 171.

§ 3154 (e). **Waiver of exemption. Notice.** [Either an employer or an employee, who has exempted himself, by proper notice, from the operation

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of this law, may at any time waive such exemption and thereby accept the provisions of this law by giving notice as herein provided, which notice of waiver of such exemption shall be substantially in the following form, to wit:

EMPLOYERS' NOTICE OF WAIVER OF EXEMPTION.

To the Employees of the Undersigned, and the Industrial Commission of Georgia:

You and each of you are hereby notified that the undersigned hereby waives exemption from the operation and effect of that Act of the General Assembly of Georgia, known as the Workmen's Compensation Act, which exemption was heretofore accomplished through notice to reject said Act, given as provided by said Act, on the.....day of.....19...., and accepts the terms, conditions and provisions to provide, secure and pay compensation to employees of the undersigned for injuries received as provided in said Act.

(Signed).....

State of Georgia,

County of.....

The undersigned being first duly sworn deposes and says that a true, correct and verbatim copy of the foregoing notice was, on the.....day of.....19...., posted at.....(state fully place where posted).

Sworn to and subscribed before me, this.....day of.....19....

.....Notary Public.

EMPLOYEES' NOTICE TO WAIVE EXEMPTION.

To.....(name of employer) and the Industrial Commission of Georgia:

You and each of you are hereby notified that the undersigned hereby waives his exemption from the operation and effect of that Act of the General Assembly of Georgia, known as the Georgia Workmen's Compensation Act, which exemption was accomplished through notice as provided in said Act, given on the.....day of.....19...., and accepts the provisions of said Act for the payment of compensation to employees for personal injury growing out of and arising from the employment while in line of duty for my employer above named.

Dated this.....day of.....19....

(Signed).....

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State of Georgia,

County of.....

The undersigned being first duly sworn deposes and says that the above and foregoing notice was on the.....day of.....19...., served on the within named employer of the undersigned by delivering to..... (naming persons served) a true, correct and verbatim copy thereof.

(Signed).....

Sworn to and subscribed before me this.....day of.....19....

.....Notary Public.

The notice to exempt from the operation and effect of said law, and the notice of waiver of such exemption and of acceptance of said law, in section 3154 (d) and in this section respectively referred to, shall be given, in order to be effective with respect to a particular accident resulting in injury or death, thirty days prior to such accident, provided that if any such accident occurred less than thirty days after the date of employment, notice of such exemption or waiver thereof and acceptance given at the time of employment, shall be sufficient notice thereof. Any such notice shall be in writing or printed and in substantially the appropriate form heretofore set out. Any such notice referred to in this or the preceding section of this law shall be given by the employer by posting the same in a conspicuous place in the shop, plant, office, room or place where the employee is employed, or by serving it personally upon him; and shall be given by the employee by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of this State. A copy of any such notice, in prescribed form, whether given by the employer or employee, shall be filed with the industrial commission, and unless so filed within ten days from the time when any such notice is served, due and proper notice shall be deemed not to have been given.]

Acts 1920, p. 172.

§ 3154 (f). **Contracts of service.** [Every contract of service between any employer and employee covered by this law, written or implied, now in operation or made or implied prior to the taking effect of this law, shall, after the law has taken effect, be presumed to continue subject to the provisions of this law; and every such contract made subsequent to the taking effect of this law shall be presumed to have been made subject to the provisions of this law, unless either party shall give notice in the manner provided in section 3154 (e) to the other party to such contract, that the provisions of this law, other than sections 3154 (p), 3154 (q), and 3154 (r), are not intended to apply. A like presumption shall exist

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equally in the case of all minors, unless notice of the same character be given by or to the parent or guardian of the minor, or, in cases where such minor has no parent or guardian, then by or to the next of kin of said minor, *sui juris*.]

Acts 1920, p. 175.

§ 3154 (g). **Relief from obligations.** [No contract or agreement, written or implied, no rule, regulation or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this law, except as herein otherwise expressly provided.]

Acts 1920, p. 175.

§ 3154 (h). **Provisions not applicable to public employees.** [Neither any municipal corporation within the State, nor any political subdivision thereof, nor any employee of any such corporation or subdivision shall have the right to reject the provisions of this law relative to payment and acceptance of compensation; and the provisions of sections 3154 (e), 3154 (f), 3154 (p), 3154 (q) and 3154 (r) shall not apply to them.]

Acts 1920, p. 175.

3154 (i). **Law not applicable to interstate carriers.** [This law shall not apply to any common carrier by railroad engaging in commerce between any of the several States or Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, nor to any person suffering injury or death while he is employed by such carrier in such commerce, nor shall this law be construed to lessen the liability of such common carrier or to diminish or take away in any respect any right that any person so employed or the personal representative or kindred or relation or dependant of such person may have under the law of Congress relating to the liability of common carriers by railroads to their employees in certain cases, approved April 22nd, 1908.]

Acts 1920, p. 176.

§ 3154 (j). **No application to prior accidents.** [The provisions of this law shall not apply to injuries or death, nor to accidents which occurred prior to the taking effect of this law.]

Acts 1920, p. 176.

§ 3154 (k). **Insurance of compensation.** [Every employer who accepts the compensation provisions of this law shall insure the payment of compensation to his employees in the manner hereinafter provided, and while such insurance remains in force he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified.]

Acts 1920, p. 176.

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§ 3154 (1). **Other remedies excluded by this law.** [The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this law respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise on account of such injury, loss of service or death.]

Acts 1920, p. 176.

§ 3154 (m). **No relief from penalty.** [Nothing in this law shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty.]

Acts 1920, p. 177.

§ 3154 (n). **Employee's misconduct.** [No compensation shall be allowed for any injury or death due to the employee's wilful misconduct, including intentional self-inflicted injury, or growing out of his attempt to injure another, or due to intoxication or wilful failure or refusal to use a safety appliance or perform a duty required by statute, or the wilful breach of any rule or regulation adopted by the employer and approved by the industrial commission, and brought prior to the accident to the knowledge of the employee. The burden of proof shall be upon him who claims an exemption or forfeiture under this section.]

Acts 1920, p. 177.

§ 3154 (o). **Common carriers.** [This law shall not apply to common carriers, engaged in intrastate trade commerce, the motive power of which is steam, nor shall this law be construed to lessen the liability of such common carriers or to take away or diminish any right that any employee, or in case of his death, the personal representative of such employee, of such common carrier may have, under the laws of this State; nor to casual employees, farm laborers or domestic servants, nor to employees of institutions maintained and operated as public charities, nor to employers of such persons, nor to any person, firm or private corporation, including any public service corporation, that has regularly in service less than ten employees in the same business within this State; unless such employees and their employers voluntarily elect to be bound by this law.]

Acts 1920, p. 177.

§ 3154 (p). **Action of exempted employer.** [An employer who elects not to operate under this law, shall not in any suit at law instituted by an employee, subject to this law, to recover damages for personal injury or death by accident, be permitted to defend any such suit at law upon any or all of the following grounds:

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- (a) That the employee was negligent.
- (b) That the injury was caused by the negligence of a fellow employee.
- (c) That the employee had assumed the risk of the injury.]

Acts 1920, p. 177.

§ 3154 (q). **Action of exempted employee.** [An employee who elects not to operate under this law shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this law, proceed at common law, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant and assumption of risk, as such defenses exist at common law.]

Acts 1920, p. 178.

§ 3154 (r). **Applicability of section 3154 (p) when employer and employee are exempt.** [When both the employer and employee elect not to operate under this law, the liability of the employer shall be the same as though he alone rejected the terms of this law, and in any suit brought against him by such employee the employer shall not be permitted to avail himself of any of the common law defenses cited in section 3154 (p).]

Acts 1920, p. 178.

§ 3154 (s). **Settlements encouraged.** [Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer, but rather to encourage them, so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this law. A copy of such settlement agreement shall be filed, by the employer, with the commission and no such settlement shall be binding until approved by the commission.]

Acts 1920, p. 178.

§ 3154 (t). **Contractor, when liable. Recovery.** [A principal, intermediate or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his sub-contractors and engaged upon the subject matter of the contract to the same extent as the immediate employer.

Any principal, intermediate or sub-contractor who shall pay compensation under the foregoing provisions may recover the amount paid, from any person who, independently of this section, would have been liable to pay compensation to the insured employee, or from any intermediate contractor.

Every claim for compensation under this section shall be in the first instance presented to and instituted against the immediate employer, but such proceedings shall not constitute a waiver of the employee's rights to recover compensation under this law from the principal or intermediate

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contractor, provided that the collection of full compensation from one employer shall bar recovery by the employee against any others, nor shall he collect from all a total compensation in excess of the amount for which any of the said contractors is liable.

This section shall apply only in cases where the injury occurred on, in or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under his control or management.]

Acts 1920, p. 178.

§ 3154 (u). **Priority of claims.** [All rights of compensation granted by this law shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor.]

Acts 1920, p. 179.

§ 3154 (v). **Claims not assignable.** [No claim for compensation under this law shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors.]

Acts 1920, p. 179.

§ 3154 (w). **Notice of accident.** [Every injured employee or his representative shall immediately on the occurrence of any accident or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this law, prior to the giving of such notice; unless it can be shown that the employer, his agent or representative had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or by fraud or deceit; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident and if death results from the accident also within thirty days after death, unless reasonable excuse is made to the satisfaction of the industrial commission for not giving such notice, and it is reasonably proved to the satisfaction of the commission that the employer has not been prejudiced thereby.]

Acts 1920, p. 180.

§ 3154 (x). **Contents of notice. Delivery.** [The notice provided in the foregoing section shall state in ordinary language the name and address of the employee, the time, place, nature and cause of the accident and of the resulting injury or death, and shall be signed by the employee or by a person in his behalf, or in the event of his death by any one or more of his dependants or by a person in their behalf. No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove

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that his interest was prejudiced thereby, and then only to such extent as the prejudice. Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State, or may be sent by registered letter addressed to the employer at his last known residence or place of business.]

Acts 1920, p. 180.

§ 3154 (y). **Time of filing claim.** [The right to compensation under this law shall be forever barred, unless a claim be filed with the industrial commission within one year after the accident, and, if death results from the accident, unless a claim therefor is filed with the commission within one year thereafter.]

Acts 1920, p. 181.

§ 3154 (z). **Medical attention. Failure to provide.** [For a period of not exceeding thirty days after an accident the employer shall furnish, or cause to be furnished, free of charge to the injured employee, and the employee shall accept such necessary medical attention as the nature of the accident may require. The industrial commission may at any time, for good cause shown or in its discretion, order a change in such medical attention so furnished by the employer: Provided, however, that the total liability of the employer for necessary medical attention shall not exceed \$100.00. During the whole or any part of the remainder of disability resulting from the injury, the employer may, at his own option, continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician, unless otherwise ordered by the industrial commission, and in addition such surgical and hospital service and supplies as may be deemed necessary by said attending physician or the industrial commission. The refusal of the employee to accept any medical, hospital or surgical service when provided by the employer, or ordered by the industrial commission, shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the industrial commission the circumstances justified the refusal, in which case the industrial commission may order a change in the medical or hospital service. If in an emergency on account of the employer's failure to provide the medical care during the first thirty days, as herein specified, a physician other than provided by the employer is called to treat the injured employee, during the first thirty days, the reasonable cost of such service, not to exceed \$100.00 as above set out, shall be paid by the employer if ordered so to do by the industrial commission.]

Acts 1920, p. 181.

§ 3154 (aa). **Liability for medical attention limited.** [The pecuniary liability of the employer for medical, surgical and hospital service herein

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required when ordered by the commission shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured persons, and shall not, in any event, exceed the aggregate of \$100.00 in amount. The employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident and shall be compensated for as such.]

Acts 1920, p. 182.

§ 3154 (bb). **Physical examination. Refusal to submit to treatment.** [After an injury and so long as he claims compensation, the employee, if so requested by his employer, shall submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the industrial commission. The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. No fact communicated to, or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this law, or in any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this law. If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this law shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of suspension unless in the opinion of the industrial commission the circumstances justify the refusal or obstruction. The employer, or the industrial commission, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same. No compensation shall be payable for the death or disability of an employee if his death be caused by, or in so far as his disability may be aggravated, caused or continued by an unreasonable refusal or neglect to submit to or follow any competent or reasonable surgical treatment.]

Acts 1920, p. 182.

§ 3154 (cc). **Period of incapacity.** [No compensation shall be allowed for the first fourteen calendar days of incapacity resulting from an injury except the benefits provided for in section 3154 (z); but if incapacity extends beyond that period, compensation shall commence with the fifteenth day of disability; provided that if incapacity extends beyond a

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period of four weeks from the date of the injury, then compensation is to be paid from the date of the injury, subject to the other provisions of this law.]

Acts 1920, p. 183.

§ 3154 (dd). **Total incapacity.** [Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total incapacity a weekly compensation equal to one-half his average wages, but not more than twelve dollars, nor less than six dollars a week; and in no case shall the period covered by such compensation be greater than three hundred and fifty weeks, nor shall the total amount of all compensation exceed four thousand dollars.]

Acts 1920, p. 183.

§ 3154 (ee). **Partial incapacity. Limit of compensation.** [Except as otherwise provided in the next section hereafter, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such incapacity, a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than twelve dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury. In case the partial incapacity begins after a period of total incapacity, the latter period shall be deducted from the maximum period herein allowed for partial incapacity.]

Acts 1920, p. 183.

§ 3154 (ff). **Payments for injuries.** [In cases included by the following schedule, the incapacity in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified therein, and shall be in lieu of all other compensation, to wit:

(a) For the loss of a thumb, fifty per centum of the average weekly wages during sixty weeks.

(b) For the loss of a first finger, commonly called the index finger, fifty per centum of the average weekly wages during thirty-five weeks.

(c) For the loss of a second finger, fifty per centum of the average weekly wages during thirty weeks.

(d) For the loss of a third finger, fifty per centum of the average weekly wages during twenty weeks.

(e) For the loss of a fourth finger, commonly called the little finger, fifty per centum of average weekly wages during fifteen weeks.

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(f) The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one-half of such thumb or finger, and the compensation shall be for one-half of the periods of time above specified.

(g) The loss of more than one phalange shall be considered the loss of the entire finger or thumb; provided, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(h) For the loss of a great toe, fifty per centum of the average weekly wages during thirty weeks.

(i) For the loss of one of the toes other than a great toe, fifty per centum of the average weekly wages during ten weeks.

(j) The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and the compensation shall be for one-half of the periods of time above specified.

(k) The loss of more than one phalange shall be considered as the loss of the entire toe.

(l) For the loss of one of the toes other than a great toe, fifty per wages during one hundred and fifty weeks.

(m) For the loss of an arm, fifty per centum of the average weekly wages during two hundred weeks.

(n) For the loss of a foot, fifty per centum of the average weekly wages during one hundred and twenty-five weeks.

(o) For the loss of a leg, fifty per centum of average weekly wages during one hundred and seventy-five weeks.

(p) For the loss of an eye, fifty per centum of the average weekly wages during one hundred weeks.

(q) For the complete loss of hearing in both ears, fifty per centum of average weekly wages during one hundred and fifty weeks.

(r) Total loss of use of a member or loss of vision of an eye, shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss. Loss of both arms, hands, legs or feet, or of any two of these members, the permanent total loss of vision in both eyes, shall be deemed permanent total incapacity and shall be compensated under section 3154 (dd).

The weekly compensation payments referred to in this section shall be subject to the same limitations as to maximum and minimum as set out in section 3154 (dd).]

Acts 1920, p. 184.

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§ 3154 (gg). **Refusal of employment.** [If an injured employee refuses employment procured for him suitable to his capacity, he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the industrial commission such refusal was justified.]

Acts 1920, p. 186.

§ 3154 (hh). **Injuries not specified in section 3154 (ff).** [If an employee who suffers an injury in his employment has a permanent disability or has sustained a permanent injury, such as specified in section 3154 (ff), suffered elsewhere, he shall be entitled to compensation only for the degree of incapacity which would have resulted from the later accident if the earlier disability or injury had not existed.]

Acts 1920, p. 186.

§ 3154 (ii). **Two injuries.** [If an employee receives an injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, unless the later injury be a permanent injury, such as specified in section 3154 (ff); but he shall be entitled to compensation for that injury and from the time of that injury which will cover the longest period and the largest amount payable under this law.]

Acts 1920, p. 186.

§ 3154 (jj). **Two permanent injuries.** [If an employee receives a permanent injury as specified in section 3154 (ff), after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding three hundred and fifty weeks. When the previous and subsequent permanent injuries received in the same employment result in total disability, compensation shall be payable for permanent total disability, but payments made for the previous injury shall be deducted from the total payment of compensation due.]

Acts 1920, p. 187.

§ 3154 (kk). **Accidents outside of State.** [(a) Where an accident happens while the employee is employed elsewhere than in this State, which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, and if the employer's place of business is in this State, or if the residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State: (b) Provided,

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however, if an employee shall receive compensation or damages under the laws of any other State, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this law.]

Acts 1920, p. 187.

§ 3154 (11). **Death for other causes than injury. Death resulting from injury. Funeral. Dependents.** [When an employee is entitled to compensation under this law for an injury received, and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

If during the period of disability caused by an accident arising out of and in the course of the employment, death results proximately therefrom, the compensation under this law shall be as follows:

(a) The employer shall, in addition to any other compensation, pay the reasonable expenses of the employee's last sickness, and burial expenses not to exceed \$100.00. If the employee leaves no dependents, this shall be the only compensation.

(b) The employer shall pay the dependents of the employee wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to one-half of his average weekly wages, but not more than ten dollars nor less than five dollars, for a period of three hundred weeks from the date of the injury.

(c) If the employee leaves only dependents partly dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid as aforesaid, shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to total dependency at the time of the injury.

(d) When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin on the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury, nor except during dependency. The total compensation to be paid to all dependents of a deceased employee shall not exceed in the aggregate ten dollars per week.

(e) If the employee does not leave dependents, citizens of or residing at the time of the accident in the United States or Dominion of Canada, the amount of compensation shall not in any case exceed \$1,000.00.]

Acts 1920, p. 187.

§ 3154 (mm). **List of dependents. Termination of dependence.** [The compensation provided for in section 3154 (11) shall be payable only to

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dependents and only during dependency. The following persons shall be conclusively presumed to be the next of kin wholly dependent for support upon the deceased employee:

(a) A wife upon a husband whom she had not voluntarily deserted or abandoned at time of the accident.

(b) A husband upon a wife with whom he lived at the time of her accident if he is then incapable of self-support and actually dependent upon her.

(c) A boy under the age of eighteen, or a girl under the age of eighteen, upon a parent. If a child is over the ages specified above, but physically or mentally incapacitated from earning a livelihood, he or she shall be presumed to be totally dependent.

As used in this section, the term "boy," "girl," or "child" shall include step-child, legally adopted children, posthumous children, acknowledged illegitimate children, but shall not include married children; the term "parent" shall include step-parents and parents by adoption.

If the deceased employee leaves dependent surviving spouse, as above described, and no dependent child or children, the full compensation shall be paid to such spouse; if the deceased employee leaves dependent surviving spouse, as above described, and also a dependent child, or children, then the full compensation shall be paid to such spouse for his or her use and that of such child or children, the commission, however, to have the power in proper cases, in its discretion, to apportion the compensation; if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any, share and share alike. If there be no person or persons wholly dependent, then payment shall be made to partial dependents.

In all other cases, questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident, but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed, unless the dependency existed for a period of three months or more prior to the accident; and in such other cases if there is more than one person wholly dependent, the death benefit shall be divided among them, and persons partially dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

For the purpose of this law, the dependence of a widow or widower of a deceased employee shall terminate with re-marriage. The dependence of a child, except a child physically or mentally incapacitated from earning a livelihood, shall terminate with the attainment of eighteen years of age.

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In all cases, except such as are hereinbefore specifically provided for, where there are both total and partial dependents and the total dependents die, re-marry or cease to be dependents, the partial dependents shall be entitled to the balance of compensation, if any.]

Acts 1920, p. 188.

§ 3154 (nn). **Total compensation.** [The total compensation payable under this law shall in no case exceed four thousand dollars.]

Acts 1920, p. 190.

§ 3154 (oo). **Payments not due when made.** [Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this law were not due and payable when made, may, subject to the approval of the industrial commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payments.]

Acts 1920, p. 190.

§ 3154 (pp). **Monthly or quarterly payments.** [The industrial commission, upon application of either party, may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly.]

Acts 1920, p. 191.

§ 3154 (qq). **Payment in lump sum.** [Whenever any weekly payment has been continued for not less than twenty-six weeks, the liability therefor may, where the parties agree and the industrial commission deems it to be to the best interests of the employee or his dependents, or where it will prevent undue hardships on the employer, or his insurance carrier, without prejudicing the interests of the employee or his dependents, be redeemed, in whole or in part, by the payment, by the employer, of a lump sum which shall be fixed by the commission, but in no case to exceed the commutable value of the future installments which may be due under this law: Provided, that the lump sum to be paid shall be fixed at an amount which will equal the total sum of the probable future payments, capitalized at their present value upon the basis of interest calculated at five per centum per annum.]

Acts 1920, p. 191.

§ 3154 (rr). **Trustees.** [Whenever the industrial commission deems it expedient, any lump sum, subject to the provisions of the foregoing section, shall be paid by the employer to some suitable person or corporation appointed by the superior court of the county wherein the accident

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occurred, or the original hearing was held, as trustee, to administer the same for the benefit of the person or persons entitled thereto in the manner provided by the commission. The receipt of such trustees for the amount as paid shall discharge the employer or any one else who is liable therefor.]

Acts 1920, p. 191.

§ 3154 (ss). **Review of awards.** [Upon its own motion before judicial determination or upon the application of any party in interest on the ground of a change in condition, the industrial commission may at any time review any award or any settlement made between the parties and filed with the commission and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded or agreed upon, subject to the maximum or minimum provided in this law, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any monies paid.]

Acts 1920, p. 191.

§ 3154 (tt). **Receipts from widow; from minor; from guardian. Rival claimants.** [(a) Whenever payment of compensation, in accordance with the terms of this law, is made to a widow or widower for her or his use or for her or his use and the use of the child or children, the written receipt thereof of such widow or widower shall acquit the employer; (b) whenever payment in accordance with the terms of this law is made to any minor employee eighteen years of age or over, the written receipt of such person shall acquit the employer. In cases where an infant or minor under the age of eighteen years shall be entitled to receive a sum or sums amounting in the aggregate to not more than three hundred dollars as compensation for injuries, or as a distributive share by virtue of this law, the father, mother, natural guardian or legally appointed guardian of such infant or minor shall be authorized and empowered to receive such monies for the use and benefit of said minor and to receipt therefor; and the release or discharge of such father, mother, natural guardian or legally appointed guardian shall be in full and complete discharge of all claims or demands of such infant or minor thereunder; (c) whenever payment of over three hundred dollars, in accordance with the terms of this law, is made to a minor under eighteen years of age, or to a minor child over eighteen physically or mentally incapable of earning, the same shall be made to his duly and legally appointed guardian or to some suitable person or corporation appointed by the superior court as hereinbefore provided, as a trustee, and the receipt of such guardian or such trustee shall acquit the employer; (d) payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other

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dependents shall protect and discharge the employer unless such dependent or dependents prior in right shall have given notice of his or their claim. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the industrial commission to decide between them.]

Acts 1920, p. 192.

§ 3154 (uu). **Minor's or lunatic's trustee.** [If an injured employee is mentally incompetent or is under eighteen years of age at the time when any right or privilege accrues to him under this law, his guardian, or trustee, may in his behalf claim and exercise such right or privilege.]

Acts 1920, p. 193.

§ 3154 (vv). **No time limit against lunatics or minors without trustees.** [No limitation of time provided in this law for the giving of notice or making claim under this law shall run against any person who is mentally incompetent, or a minor dependent, so long as he has no guardian or trustee.]

Acts 1920, p. 193.

§ 3154 (ww). **Joint service of more than one employer.** [Whenever any employee for whose injury or death compensation is payable under this law shall at the time of the injury be in the joint service of two or more employers subject to this law, such employers shall contribute to the payment of such compensation in proportion to their wage liability to such employee: Provided, however, that nothing in this section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation.]

Acts 1920, p. 193.

§ 3154 (xx). **Industrial commission created.** [There is hereby created a commission to be known as the industrial commission, consisting of the commissioner of commerce and labor, who shall be ex-officio chairman; of the attorney-general, and two members to be appointed by the Governor. One of the members of this commission to be appointed by the Governor shall serve for two years, and another for the term of four years; and thereafter each member shall be appointed for a term of four years; no more than one member of said commission appointed by the Governor shall be a person who on account of his previous vocation, employment or affiliation, shall be classified as a representative of employers, and not more than one of such appointees shall be a person who, on account of his previous vocation, employment or affiliation shall be classed as a representative of employees. Each of the appointees by the Governor on said

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commission shall devote his entire time to the duties of his office, and shall not hold any position of trust or profit, or be engaged in any occupation or business interfering or inconsistent with his duties as such member.]

Acts 1920, p. 193.

§ 3154 (yy). **Salary. Secretary-treasurer. Clerical help. Expenses.**

[(a) The salary of each member of the commission appointed by the Governor shall be \$4,000.00 per year. The commission may appoint a secretary-treasurer at a salary of not more than \$2,000.00 per year, who shall give bond in a sum prescribed by the commission, and who may be removed by the commission; (b) the commission may also, subject to the approval of the Governor, employ such clerical or other assistance as may be deemed necessary and fix the compensation of all persons so employed; (c) the members of this commission and its assistants shall be entitled to receive the actual necessary expenses while traveling on business of the commission, but such expenses shall be sworn to by the persons who incurred the same and shall be approved by the chairman of the commission before payment is made; (d) all salaries and expenses of the commission shall be audited and paid out of the funds in the hands of the secretary-treasurer according to rules and regulations prescribed by the commission.]

Acts 1920, p. 194.

§ 3154 (zz). **Offices. Deputies.** [(a) The commission shall be provided with adequate offices in the capitol or some other suitable building in the city of Atlanta, in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery and other supplies. (b) The commission may appoint deputies from time to time, as required, to serve only, as and when needed, without permanent positions, who shall have the power to subpoena witnesses and administer oaths, and who may take testimony in such cases as the commission may deem proper. Such testimony shall be transmitted in writing to the commission and the commission shall fix the compensation of such deputies. (c) The commission or any member thereof may hold sessions at any place within the State as may be deemed necessary by the commission, subject to the other provisions of this law.]

Acts 1920, p. 195.

§ 3154 (aaa). **Rules. Subpoenas, etc. Quorum.** [(a) The commission may make rules, not inconsistent with this law, for carrying out the provisions of this law. Processes and procedure under this law shall be as summary and simple as reasonably may be. The commission or any member thereof or any person deputed by it shall have the power for the purpose of this law to subpoena witnesses, administer or cause to have

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administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute. (b) The sheriffs of this State within their respective jurisdictions, and their respective deputies, shall serve all subpoenas of the commission or its deputies and shall receive the same fees as are now provided by law for like civil actions; each witness who appears in obedience to such subpoena of the commission shall receive for attendance the fees prescribed by law for witnesses in civil cases in courts. The superior courts shall, on application of the commission or any member or deputy thereof, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (c) Any three members of the commission shall constitute a quorum for the transaction of any business or the rendition of any decision herein provided to be made by the full commission.]

Acts 1920, p. 195.

§ 3154 (bbb). **Publications.** [The commission shall prepare and cause to be printed, and upon request furnish free of charge to any employee or employer such blank forms and literature as it shall deem requisite to facilitate or promote the efficient administration of this law. The commission shall tabulate the accident reports received from employers in accordance with section 3154 (mmm), and shall publish the same in the annual report of the commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications and the employers' reports themselves shall be private records of the commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages, or in any proceeding under this law.]

Acts 1920, p. 196.

§ 3154 (ccc). **Agreements.** [If after fourteen days from the date of the injury or at any time in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this law, a memorandum of the agreement in the form prescribed by the commission shall be filed with the commission for approval as herein provided; otherwise such agreement shall be voidable by the employee or his dependents. If approved by the commission, thereupon the memorandum shall for all purposes be enforced by decree or judgment of the superior court, as herein specified.]

Acts 1920, p. 196.

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§ 3154 (ddd). **Hearings regarding disagreements.** [If the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this law, or if they have reached such an agreement which has been signed and filed with the commission and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the commission for a hearing in regard to the matters at issue and for a ruling thereon. Immediately after such application has been received the commission shall set a date for a hearing, which shall be held as soon as practicable, and shall notify the parties at issue of the time and place of such hearing. The hearing shall be held in the county where the injury occurred, if the same occurred in this State, unless otherwise agreed to between the parties and authorized by the commission. If the injury occurred without the State of Georgia, and is one for which compensation is payable under this law, then the hearing above referred to may be held in the county of the employer's residence or place of business, or in any other county of the State which will, in the discretion of the commission, be the most convenient for a hearing.]

Acts 1920, p. 197.

§ 3154 (eee). **Conduct of hearings.** [The commission or any of its members shall hear the parties at issue and their representatives and witnesses and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, and a copy of the award shall immediately be sent to the parties at dispute. The parties may be heard by a deputy, in which event he shall swear or cause the witnesses to be sworn and shall transmit all testimony to the commission for its determination and award.]

Acts 1920, p. 197.

§ 3154 (fff). **Review.** [If an application for review is made to the commission within seven days from the date of notice of the award, the full commission shall review the evidence, or, if deemed advisable, as soon as practicable, hear the parties at issue, their representatives and witnesses, and shall make an award and file the same in like manner as specified in the foregoing section, together with its rulings of law in the premises. A copy of the award so made on review shall immediately be sent to the parties at dispute.]

Acts 1920, p. 198.

§ 3154 (ggg). **Appeals to superior court. Grounds of re-order. Writ of error.** [Any award of the commission, provided for in section 2154 (eee), with respect to which no application for a review thereof be

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filed in due time, or an award of the commission upon such review as provided in section 3154 (fff), shall, in either event, as the case may be, and subject to the other provisions of this law, be a final award and shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within thirty days from the date of any such final award, or within thirty days from the date of any other final order or judgment of said commission, but not thereafter, appeal from the decision in such final award or from any other final decision of said commission to the superior court of the county in which the injury occurred, or if the injury occurred without the State, then to the superior court of the county in which the original hearing was had, in the manner hereafter outlined, and upon the following grounds, viz.: The party conceiving himself to be aggrieved may file an application in writing with the commission asking for an appeal from any such order or decree, stating generally the grounds upon which such appeal is sought. In the event such appeal is filed as hereinbefore provided, the commission shall, within thirty days from the filing of the same, cause certified copies of all documents and papers then on file in its office in the matter, and a transcript of all testimony taken therein, to be transmitted with its findings and order or decree to the clerk of the superior court to which the case is appealable, as hereinbefore set out. The cause so appealed may thereupon be brought on for a hearing in either term time or vacation before said superior court upon such record by either party on ten days written notice to the other; subject, however, to an assignment of the same for hearing by the court. The findings of fact made by the commission within its power shall, in the absence of fraud, be conclusive, but upon such hearing the court shall set aside order or decree of the industrial commission, if it be found:

(1) That the industrial commission acted without or in excess of its powers.

(2) That the order or decree was procured by fraud.

(3) That the facts found by the industrial commission do not support the order or decree.

(4) That there is not sufficient competent evidence in the record to warrant the industrial commission in making the order or decree complained of or,

(5) That the order or decree is contrary to law.

No order or decree of the industrial commission shall be set aside by the court upon any grounds other than one or more of the grounds above stated. If not set aside upon one or more of such stated grounds, the court shall affirm the order, judgment, decree or decision of the commission so appealed from. Upon the setting aside of any such order, decree or decision of the commission, the court may recommit the controversy to

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the commission for further hearing or proceedings in conformity with the judgment and opinion of the court, or such court may enter the proper judgment upon the findings, as the nature of the case may demand. Such decree of the court shall have the same effect and all proceedings in relation thereto shall, subject to the other provisions of this law, thereafter be the same as though rendered in a suit heard and determined by said court. The Court of Appeals of Georgia shall, within thirty days after this law takes effect, prescribe such rules of procedure, not inconsistent with the above and foregoing, as may be necessary or proper to fix the details of the form and manner of such appeal.

The commission of its own motion may certify questions of law to the Court of Appeals of Georgia for decision and determination by the said court. Any party in interest who is aggrieved by a judgment entered by the superior court upon an appeal from an order or decree of the commission to the superior court, may appeal therefrom to the Court of Appeals of Georgia by writ of error and bill of exceptions within the time and in the manner provided by law for appeals by fast bill of exceptions from other orders, judgments and decrees of the superior court made by law reviewable upon fast bills of exceptions. In case of an appeal from the decision of the commission, or of a certification by said commission of questions of law to the Court of Appeals, said appeal or certification shall operate as a supersedeas, if the employer has complied with the provisions of this law respecting insurance, and no such employer shall be required to make payment of the award involved in the questions made in the case so appealed or certified, until such questions at issue therein shall have been fully determined in accordance with the provisions of this law.]

Acts 1920, p. 198.

§ 3154 (hhh). **Judgment in accordance with commission.** [Any party in interest may file in the superior court of the county in which the injury occurred, or if the injury occurred without the State of Georgia, then in the county in which the original hearing was had, a certified copy of a memorandum of agreement approved by the commission, or of a final order or decision of the commission, or of an award of the commission unappealed from, or of an award of the commission affirmed upon appeal, whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court: Provided, however, that where the payment of compensation is insured or provided for in accordance with the provisions of this law, no such judgment shall be entered nor execution thereon issued, except upon application to the court and for good cause shown. Upon presenta-

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tion to the court of a certified copy of a decision of the commission ending, diminishing or increasing a weekly payment under the provisions of this law, particularly of section 3154 (ss), the court shall revoke or modify the order or decree to conform to such decision of the commission.]

Acts 1920, p. 200.

§ 3154 (iii). **Proceedings without reasonable grounds.** [If the commission or any court before whom any proceedings are brought under this law shall determine that such proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who has brought or defended them.]

Acts 1920, p. 201.

§ 3154 (jjj). **Appointment of physician.** [The commission or any member thereof may, upon the application of either party or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee and to testify in respect thereto. Said physician or surgeon shall be allowed traveling expenses and a reasonable fee to be fixed by the commission, not exceeding ten dollars for each examination and report, but the commission may allow additional reasonable amounts in extraordinary cases. The fees and expenses of such physician or surgeon shall be paid by the State.]

Acts 1920, p. 201.

§ 3154 (kkk). **Fees of attorneys and physicians. Hospital charges.** [Fees of attorneys and physicians and charges of hospitals for services under this law shall be reasonable and measured according to the employee's station and shall be subject to the approval of the commission.]

Acts 1920, p. 202.

§ 3154 (lll). **Questions settled by commission.** [All questions arising under this law, if not settled by agreements of the parties interested therein, with the approval of the commission, shall be determined by the commission, except as otherwise herein provided.]

Acts 1920, p. 202.

§ 3154 (mmm). **Record of injuries. Records of commission. Report on termination of incapacity. Penalty.** [(a) Every employer who accepts the provisions of this law relative to the payment of compensation, shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment, on blanks approved by the commission. Within ten days after the occurrence and knowledge thereof, as provided in section 3154 (w), of an injury to an employee requiring medical or surgical treatment, or causing his absence from work for more than fourteen days, a report thereof shall be made in writing and mailed

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to the commission on blanks to be procured from the commission for this purpose. (b) The records of the commission, in so far as they refer to accidents, injuries and settlements, shall not be open to the public; but only to the parties satisfying the commission of their interest in such records and the right to inspect them. (c) Upon the termination of the disability of the injured employee, the employer shall make a supplementary report to the commission on blanks to be procured from the commission for the purpose. (d) The said report shall contain the name, nature and location of the business of the employer, and name, age, sex, and wages and occupation of the injured employee, and shall state the date and hour of the accident causing the injury, the nature and cause of the injury and such other information as may be required by the commission. (e) Any such employer who refuses or wilfully neglects to make the report required by this section shall be liable for a penalty of not more than twenty-five dollars for each refusal or wilful neglect, to be recoverable in any court of competent jurisdiction in a suit by the commission.]

Acts 1920, p. 202.

§ 3154 (nnn). **Insurance. Security.** [Every employer who accepts the provisions of this law relative to the payment of compensation shall fully insure and keep fully insured, unless otherwise ordered or permitted by the commission, his liability thereunder in some corporation, association, or organization, licensed as provided by law, to transact the business of workmen's compensation insurance in this State, or in some mutual insurance association formed by a group of employers so licensed, or shall furnish to the commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due as provided for in this law. In the latter case the commission may in its discretion require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred: Provided, that it shall be satisfactory proof of the employer's financial ability to pay direct the compensation in the amount and manner when due, as provided for in this law, and acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred, if the employer shall show to the commission that he is a member of a mutual insurance company, duly licensed to do business in this State by the insurance commissioner, as provided by the laws of this State, or of an association or group of employers, so licensed, and as such is exchanging contracts of insurance with the employers of this and other States, through a medium as specified and located in their agreements between each other, but this proviso shall in no wise restrict or qualify

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the right of self-insurance as hereinbefore authorized. Nothing herein shall be construed to require an employer to place his entire insurance in a single insurance carrier.]

Acts 1920, p. 203.

§ 3154 (ooo). **Evidence of compliance with section 3154 (nnn). Refusal to comply.** [(a) Every employer accepting the compensation provisions of this law shall within thirty days after this law takes effect file with the commission in form prescribed by it, and thereafter annually, or as often as the commission, in its discretion, may deem necessary, evidence satisfactory to the commission of his compliance with the provisions of section 3154 (nnn) and all others relating thereto. (b) If such employer refuses or wilfully neglects to comply with these provisions he shall be punished by a fine of not less than \$10.00 nor more than \$100.00 and after such conviction shall be subject to a fine of not less than one dollar nor more than ten dollars for each day of such refusal or neglect, and until he shall comply with such provisions, and also such employer shall be liable during continuance of such refusal or neglect to an employee, at the option of the employee, either for compensation under this law or at law in the same manner as provided in section 3154 (p).]

Acts 1920, p. 204.

§ 3154 (ppp). **Certificate.** [Whenever an employer has complied with the provisions of section 3154 (nnn), relating to self-insurance, the commission shall issue to such employer a certificate which shall remain in force for a period fixed by the commission, but the commission may upon at least sixty days' notice and hearing to the employer revoke the certificate upon satisfactory evidence for such revocation having been presented. At any time after such revocation the commission may grant a new certificate to the employer upon his petition.]

Acts 1920, p. 204.

§ 3154 (qqq). **Substitute systems. Termination.** [(a) Subject to the approval of the commission, any employer may enter into or continue any agreement with his employees to provide a system of compensation, benefit or insurance in lieu of the compensation and insurance provided by this law. No such substitute system shall be approved unless it confers benefits upon injured employees at least equivalent to the benefits provided by this law, nor if it requires contribution from the employees unless it confers benefits in addition to those provided under this law at least commensurate with such contribution. (b) Such substitute system may be terminated by the commission on reasonable notice and hearing to the interested parties if it shall appear that the same is not fairly

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administered or if its operation shall disclose defects threatening its solvency, or if for any substantial reason it fails to accomplish the purpose of this law; and in this case the commission shall determine upon the proper distribution of all remaining assets, if any, subject to the right of any party at interest to take an appeal to the superior court of the county wherein the principal office or chief place of business of the employer is located.]

Acts 1920, p. 205.

§ 3154 (rrr). **Knowledge of injury.** [All policies insuring the payment of compensation under this law, including all contracts of mutual, reciprocal or inter-insurance, must contain a clause to the effect that as between the employer and the insurer or insurers the notice to or knowledge of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge, as the case may be, on the part of the insurer or insurers; that jurisdiction of the insured for the purpose of this law shall be jurisdiction of the insurer or insurers; and that the insurer or insurers shall in all things be bound by and subject to the awards, judgments or decrees rendered against such insured employer.]

Acts 1920, p. 205.

§ 3154 (sss). **Policy or contract of insurance.** [No policy or contract of insurance against liability arising under this law shall be issued unless it contains the agreement of the insurer or insurers that it will promptly pay to the person entitled to same all benefits conferred by this law, and all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default of the insured after the injury or by any default in giving notice required by such policy, or otherwise. Such agreement shall be construed to be a direct promise by the insurer or insurers to the person entitled to compensation enforceable in his name.]

Acts 1920, p. 206.

§ 3154 (ttt). **Policies subject to this law. Exceptions.** [(a) Every policy for the insurance of the compensation herein provided, or against liability therefor, including all contracts of mutual, reciprocal or inter-insurance, shall be deemed to be made subject to the provisions of this law. No corporation, association or organization, and no mutual, reciprocal or inter-insurers shall enter into or make any such policy or contract of insurance unless its form shall have been approved by the commission. (b) This law shall not apply to policies of insurance against loss from explosion of boilers or fly wheels or other similar catastrophe hazards.]

Acts 1920, p. 206.

Workmen's compensation.

§ 3154 (uuu). **Rates of insurance carriers. Report to commission.** [(a) The rates charged by all carriers of insurance, including the parties to any mutual, reciprocal, or other plan or scheme, writing insurance against the liability for compensation under this law, shall be fair, reasonable and adequate, with due allowance for merit rating, and all risks of the same kind and degree of hazard, shall be written at the same rate by the same carrier. The basic rates for policies or contracts of insurance against liability for compensation under this law shall be filed with the insurance commissioner for his approval, and no policy of insurance against such liability shall be valid until the basic rate thereof has been filed with, approved and not subsequently disapproved, by the insurance commissioner. Any plan or scheme for modification of such basic rates by physical inspection or experience or merit rating shall likewise be filed with the insurance commissioner and by him approved, and no carrier of insurance shall write any such policy or contract until after filing and approval of a basic rate therefor and a schedule or plan to be employed in producing individual rates for risks. (b) Each such insurance carrier, including the parties to any mutual, reciprocal, or other plan or scheme writing insurance against the liability for compensation under this law, shall report to the insurance commissioner as provided by law, and in accordance with such reasonable rules as the insurance commissioner may at any time prescribe for the purpose of determining the solvency of the carrier, and the adequacy or reasonableness of its rates and reserves; for such purpose the insurance commissioner may inspect all the books and records of such insurance carrier and of its agent or agents, and examine its agents, officers and directors under oath.]

Acts 1920, p. 206.

§ 3154 (vvv). **Effect of unconstitutionality of part of law.** [If any section of the provisions of this law be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of this law as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.]

Acts 1920, p. 207.

§ 3154 (www). **When law effective.** [This law, except as prescribed in section 3154 (xx), shall become effective March 1, 1921, and section 3154 (xx) shall become effective October 1, 1920.]

Acts 1920, p. 207.

§ 3154 (xxx). **Tax for commission expenses.** [For the purpose of paying the expenses of this commission, there shall be collected from the insurance carriers writing this class of insurance in Georgia, a tax of one

Workmen's compensation.

per cent. of the gross earned premiums, this to be in addition to the tax collected by the insurance department under the general tax act. This one per cent. commission shall be collected by the secretary-treasurer in the same manner said tax is now collected by the insurance department. After all of the expenses, including salaries and traveling expenses of the commission and such deputies as may be authorized, have been paid the remainder of the money collected by the secretary-treasurer shall be turned into the State treasury in the manner prescribed by law.]

Acts 1920, p. 207 .

Relations arising from contracts; partnership.

FOURTH TITLE.

Of Relations Arising from Contracts.

CHAPTER 1.

Of Partnership.

ARTICLE 1.

General Principles.

§ 3155. (§ 2626.) **How created.**

Charge: Where sole issue was whether two of four defendants were partners of the others not error to instruct that question was partnership or no partnership and whether defendants were members of defendant firm when goods were bought. 143/170 (2) (84 S. E. 453).

Request here to charge this section was too general and indefinite, even if principles embodied were applicable to issues and evidence. 15 App. 736 (3) (84 S. E. 185).

Contract: Agreement in paper under seal here conveying property to secure note, also to pay part of profits of mill on the note, did not amount to partnership agreement in reference to milling business. 145/83, 84 (2) (88 S. E. 545).

Written agreement showing creation of partnership was binding upon one who did not sign same, where he accepted possession under it and engaged in partnership enterprise as member of the firm. 146/305, 306 (1) (91 S. E. 89).

Under contract set forth in petition here and the allegations thereof, there was neither a partnership between the parties nor a tenancy in common. 18 App. 479 (89 S. E. 631).

Entity: Partnership, regardless of firm name, is an entity *prima facie* distinct from any other partnership or person. 16 App. 43 (2) (84 S. E. 494).

Proof of partnership may be made by statements or admissions of the al-

leged partners. 13 App. 640 (1) (79 S. E. 759).

Where suit is brought against partnership on note, and defendants allege that maker was not a member of the firm, while admissions of that person made in absence of others would not be proof of the partnership, yet where each of the alleged partners admitted that he himself was a member, their admissions would be sufficient to show existence of the firm. *Id.*

Under plea denying partnership, evidence of defendant's conduct in and about business of alleged partnership was admissible. 15 App. 280 (2) (82 S. E. 918).

Whether collection of accounts, indorsement of notes, and other acts indicating control over business, created presumption that defendant was partner, was for jury. *Id.*

Writing signed by defendant as "treasurer" of firm was admissible to prove existence of partnership, though it did not appear that plaintiff knew of partnership prior to extending credit. *Id.* 280 (3).

Declaration of alleged partner, who interposed defense of no partnership, in nature of admission that he was member thereof, is admissible. *Id.*

Evidence in action against firm and individual members thereof held to sustain finding against defendant's plea of nonpartnership. 15 App. 786 (6) (84 S. E. 219).

Partnership; general principles.

Where business was conducted by one partner who borrowed money for alleged partnership, competent to show that other partner knew of borrowing and did not object. 17 App. 639 (3) (87 S. E. 906).

Where maker of note conveyed property as security and agreed to pay part of profits of mill, letter here by payee to maker, referring to interest on amount due and payee's share of profits, did not show a partnership in the milling business. 145/83, 84 (3) (88 S. E. 545).

Where verified plea of no partnership was duly filed, it was incumbent upon plaintiff to prove existence of partnership. 20 App. 152 (92 S. E. 759).

The issue of partnership or no partnership raised by pleadings here

was broad enough to authorize proof by plaintiff of either a partnership in fact or an ostensible partnership, and it was therefore error to exclude writings signed by defendants which plaintiff offered in evidence and which were competent to show partnership in fact, though such writings, in absence of proof that plaintiff, when entering into the contract sued upon, relied upon or was misled by admissions in the excluded writings were not admissible to show an ostensible partnership. 23 App. 580 (99 S. E. 44).

Services: Contract stipulating merely that one contracting party should receive as compensation for services one-half of profits of business was not contract of partnership. 15 App. 564 (84 S. E. 93).

§ 3156. (§ 2627.) **Extent of partnership.**

Stated. 140/26, 30 (78 S. E. 345); 16 App. 91, 94 (84 S. E. 606).

Charge: Request here to charge this section was too general and indefinite, even if principles embodied were applicable to issues and evidence. 15 App. 736 (3) (84 S. E. 185).

Promissory note payable to partnership may be transferred upon individual indorsement of all the copartners, without any indorsement in the firm name, as well as in the firm name by any one or more of the partners having authority so to do. 21 App. 741 (5) (95 S. E. 15).

§ 3157. (§ 2628.) **Open partner, etc.**

Charge on law of partnership in action against firm on account held to accord with this section, and to be properly adjusted to evidence. 15 App. 280, 281 (5) (82 S. E. 918).

Request here to charge this section was too general and indefinite, even if principles embodied were applicable to issues and evidence. 15 App. 736 (3) (84 S. E. 185).

Evidence here, in suit against one as administrator and guardian, and individually, and others, seeking to reach and apply assets, showed that administrator was conducting business of intestate for benefit of other defendants as real equitable owners. 147/695 (95 S. F. 255).

The issue of partnership or no partnership raised by pleadings here was broad enough to authorize proof by plaintiff of either a partnership in fact or an ostensible partnership, and it was therefore error to exclude writings signed by defendants which plaintiff offered in evidence and which were competent to show partnership in fact, though such writings, in absence of proof that plaintiff, when entering into the contract sued upon, relied upon or was misled by admissions in the excluded writings, were not admissible to show an ostensible partnership. 23 App. 508 (99 S. E. 44).

§ 3158. (§ 2629.) **What constitutes a partnership.**

Stated. 149/754 (1) (102 S. E. 519).

Charge on what constitutes partnership relative to third persons was not erroneous where it was in substan-

tially the language of this section. 143/170 (3) (84 S. E. 453).

Request here to charge this section

Partnership; general principles.

was too general and indefinite, even if principles embodied were applicable to issues and evidence. 15 App. 736 (3) (84 S. E. 185).

Holding out: Where business was conducted in name of "R. & Co.," not only without objection from R., but with his full knowledge and consent, and credit was asked for and obtained from plaintiff in name of the firm, on faith of membership of R. in the firm, and evidence authorized inference that he connived at the use of his name for this purpose, he is liable. 18 App. 53 (1) (88 S. E. 796).

One who tacitly permits himself to be held out to the public as a partner, though in fact having no interest in partnership, will be estopped to deny connection with firm, and will be bound, where opposite party was misled by putative status and acted thereon. 23 App. 265 (98 S. E. 102).

Where person knows that his name is being used as that of a member of a firm, and that he is being held out as partner in particular business, he must not only prohibit such use, but must take such steps as ordinarily prudent person would take in circumstances to notify public, as well as individuals to whom he knows that he has been so held out as partner, that he is not a partner. 23 App. 265 (98 S. E. 102).

Joint interest in property: Where two individual owners of horses agreed to furnish them to third person and to divide profits, but there was no agreement for joint ownership of horses, partnership could not, as such, sue hirer for negligent killing

of horse. 14 App. 209 (1) (80 S. E. 702).

Petition alleging partnership, and that plaintiff was wrongfully excluded from business, and praying accounting, but not showing terms or plaintiff's interest in the profits, is demurrable. 144/316 (87 S. E. 20).

Profits: Where, in action against two defendants, one of them denied partnership alleged, instruction that if defendants entered into business, and after expenses were paid net profits were to be divided between them, it would constitute partnership, and both parties would be liable for firm debts, was proper. 141/594 (3) (81 S. E. 866).

Contract stipulating merely that one contracting party should receive as compensation for services one-half of profits of business was not contract of partnership. 15 App. 564 (84 S. E. 93).

Petition alleging facts showing that plaintiff and defendant each owned half interest in mill, and to be entitled to profits after payment of purchase price, and defendant's refusal to account to plaintiff and withholding of entire partnership property, stated cause of action for appointment of receiver, to pay off partnership indebtedness, and for accounting, and payment of any profits to each party entitled thereto. 149/754 (2) (102 S. E. 159).

Question for jury: Partnership or no partnership is generally mixed question of law and fact, and cannot be resolved as matter of law unless verdict one way or other is demanded by evidence. 17 App. 639 (2) (87 S. E. 906).

§ 3162. (§ 2633.) How it is dissolved.

Evidence that there were outstanding debts and no final settlement sustained finding that partnership between plaintiffs had not been dissolved before commencement of suit in firm name. 16 App. 344 (4) (85 S. E. 790).

Receiver: Where both parties to dissolution proceedings prayed for dissolution and accounting, and the judge

was authorized to find that both parties violated the reciprocal duties of each to the other, not abuse of discretion to grant injunction and appoint receiver, although neither partner was insolvent, and the excepting partner offered to give bond for proper accounting as to assets in his hands. 140/248 (1) (78 S. E. 902).

Partnership; general principles.

§ 3163. (§ 2634.) **Notice of dissolution.**

Creditors: The word "creditors" is not limited to persons who were creditors of partnership at time of dissolution; person who had previously sold goods and given credit to firm during its continuance is within its meaning, and actual notice must be given to such person as a creditor. 18 App. 262 (1) (89 S. E. 458).

Where evidence fails to show affirmatively that plaintiff had ever been creditor of partnership prior to its dissolution, actual personal notice of such dissolution by withdrawal of one of the members is not indispensable to discharge of retiring partner from liability on account of goods purchased. 18 App. 262 (2) (89 S. E. 458).

Note: Where note signed in firm name by partner and manager is accepted in settlement of account against firm, partners are bound, though partnership has been dissolved without notice

to creditor. 15 App. 334 (1) (83 S. E. 158).

Notice: Where, after dissolution of partnership, former member of firm, on being offered goods for sale by traveling salesman for dealer who before dissolution sold goods to firm, tells salesman that he is no longer member of the firm, this is notice of the dissolution to the dealer represented by the salesman. 21 App. 576 (94 S. E. 820).

Proof that plaintiff had subsequently proceeded against partner in bankruptcy by proving claim in dispute as individual liability of that partner for goods sold and delivered to such partner furnished sufficient corroboration to sustain finding in accordance with presumption raised by defendant's testimony as to sending of notice of dissolution of partnership. 23 App. 261 (1) (98 S. E. 111).

§ 3164. (§ 2635.) **Effect of dissolution.**

Cited. 15 App. 334, 336 (83 S. E. 158).

Account: Trover will not lie where title to property rests in partnership, and plaintiff's interest therein cannot be determined until a full partnership accounting has been had. 13 App. 518 (2) (79 S. E. 484).

Action for partnership accounting must be brought in superior court of county of defendant's residence. *Id.*

Debts: Where W. in his individual capacity executed and delivered deed to land to secure certain indebtedness due by him to L., deed stipulating that it was given to secure "any and all indebtedness" which W. "may hereafter owe" to L., and after delivery of deed W. became member of partnership which also became indebted to L., and upon dissolution of partnership with knowledge of L., its entire indebtedness due L. was assumed by W., under terms of security deed, when W. assumed debt of co-partnership, it became his debt, and was covered by the deed. 146/741 (1) (92 S. E. 214).

Dues: Generally, suit can not be maintained by member of unincorporated fraternal association to recover dues paid by him to his partners in the association in accordance with the rules of the partnership, because his membership had been terminated at their option and against his will, except for an accounting in a court of equity. 20 App. 391 (93 S. E. 44).

Surety: Where one partner continues business after retirement of other and agrees to assume firm's debts, retiring partner becomes surety for co-partner. 17 App. 385 (1) (87 S. E. 149).

Where creditor on sufficient consideration extends time of payment of firm's debt without knowledge or consent of retiring partner, of whose retirement he knows, retiring partner is released from indebtedness assumed by continuing partner at time of retirement. *Id.* 385 (2).

§ 3166. (§ 2637.) **Denial by defendant.**

Amendment: Where partners sue in firm name, partnership need not be proved,

unless denied in verified plea; this was true where original petition alleged

Rights and liabilities of partners among themselves.

that plaintiff was a corporation, and partnership was alleged in amendment to petition. 19 App. 429 (1) (91 S. E. 432).

Burden: Where petition alleges that defendant is a partnership, and there is no special plea of no partnership, it is not incumbent on plaintiff to prove fact of partnership. 20 App. 739 (2) (93 S. E. 231).

Denial: Where uncontradicted evidence, admitted without objection, shows there was no partnership, verdict against alleged firm should be set aside, notwithstanding defendant's omission to file verified plea of no partnership. 17 App. 760 (1) (88 S. E. 695).

§ 3167. (§ 2638.) Suits by and against.

Stated. 140/26, 30 (78 S. E. 345).

Contract with partnership forms no basis for suit in favor of one of the partners individually against the other contracting party. 21 App. 436 (94 S. E. 592).

Evidence affecting one or more partners is not inadmissible in action against firm and individual partners because not applicable to another partner. 15 App. 786 (5) (84 S. E. 219).

Judgment of court of another State rendered against but one of three persons sued jointly as partners, other two not having been served, only bound partnership assets and individual partner served. 17 App. 652 (2) (87 S. E. 1101).

Rights of plaintiff not affected by amendment to plea showing that defendants signing note sued on signed separately, not collectively, since

Plea which merely "denies" that paragraph of petition which alleges fact of partnership is insufficient as plea of no partnership. 20 App. 739 (2-a) (93 S. E. 231).

Gaming: Where evidence showed that contract entered into by named person in behalf of certain others as a partnership was a gambling contract for future delivery of cotton, and that such others were not a partnership for purpose of entering into such contracts, court did not err in directing verdict in favor of plea of null partnership, or in directing verdict for such named person. 23 App. 272 (97 S. E. 887).

judgment against partnership would bind not only assets of partnership, but also individual property of partners, and interest of either in partnership might be reached by garnishment. 18 App. 206, 207 (3) (89 S. E. 156).

Jurisdiction: United States District Court for Southern District of Georgia has jurisdiction of suit for breach of partnership contract, though only one of the partners resided within district and was served. 250 Fed. 507.

Process: Where partnership of two persons residing in Fulton county, having place of business in Atlanta, was sued in Atlanta as indorser, and service was made on one partner residing in Atlanta, court had jurisdiction of subject-matter. 16 App. 14, 15 (4) (84 S. E. 483).

ARTICLE 2.

Rights and Liabilities of Partners Among Themselves.

§ 3169. (§ 2640.) Interest of each.

Good will: Allegation in action for damages brought by partnership to effect that one partner established line of patronage and built up good trade prior to creation of partnership, but which fails to show that partnership succeeded to good will of individual

partner mentioned, is defective, and should be amended or dismissed on special demurrer pointing out omission. 18 App. 196 (2) (89 S. E. 188).

Personal services: While courts do not undertake to equalize partners with reference to personal services of each,

Rights and liabilities of partners among themselves.

yet they will enforce agreement for such allowance made by partner; this agreement need not be express, if it can fairly and reasonably be implied from actions of partners and from their course of dealing, or from circumstances under which extra services are rendered. 147/178 (2) (93 S. E. 289).

Surviving partner here in action by heirs and legatees of deceased partner for accounting was not deprived of right to extra compensation for services because of statute of limita-

tion. 147/178, 179 (2-b) (93 S. E. 289).

Profits: Although under terms of contract defendants were not required to pay for interests in property sold, except from net profits, all of the partners were bound for partnership debts. 146/305, 306 (2) (91 S. E. 89).

Retrait: Where action is brought by two equal co-partners on right of action belonging to firm, neither party has right to enter retraits for firm without express consent of other partner. 24 App. 561 (5) (101 S. E. 708).

§ 3170. (§ 2641.) Contribution in case of insolvent partner.

Limitations: Right of action by partner who delivered firm property to defendants, partners, for contribution, relatively to difference in value between property delivered and that returned to him more than four years before commencement of suit, and certain moneys advanced more than four

years before suit, was barred by statute of limitations; but right of action for contribution to reimburse him for payment of firm debts which were paid by him less than four years before institution of suit was not barred. 146/305, 306 (3) (91 S. E. 89).

§ 3171. (§ 2642.) Good faith inter se.

Retrait: Where action is brought by two equal co-partners on right of action belonging to firm, neither party

has right to enter retraits for firm without express consent of other partner. 24 App. 561 (5) (101 S. E. 708).

§ 3172. (§ 2643.) Power of each partner.

Action: Generally, suit can not be maintained by member of unincorporated fraternal association to recover dues paid by him to his partners in the association in accordance with the rules of the partnership, because his membership had been terminated at their option and against his will, except for an accounting in a court of equity. 20 App. 391 (93 S. E. 44).

Note: Under this section and section 3180 one member of commercial partnership can bind it by signing its name to a note under seal in course of business. 13 App. 640 (2) (79 S. E. 759).

Petition specifically alleging that named firm were, in certain year, engaged in

mercantile business, and among other things it was buying and selling cotton, was not subject to demurrer on ground that it was not shown that alleged sale was within scope of business of said firm, it being, in view of allegation as to buying and selling cotton, matter of defense whether or not sale of cotton by defendants was without the scope of the partnership business. 23 App. 675, 676 (2) (99 S. E. 308).

Retrait: Where action is brought by two equal co-partners on right of action belonging to firm, neither party has right to enter retraits for firm without express consent of other partner. 24 App. 561 (5) (101 S. E. 708).

§ 3175. (§ 2646.) Power of majority.

Promissory note payable to partnership may be transferred upon individual indorsement of all the co-partners, without any indorsement in the firm name,

as well as in the firm name by any one or more of the partners having authority so to do. 21 App. 741 (5) (95 S. E. 15).

Rights and liabilities of partners to third persons.

Retraxit: Where action is brought by two equal co-partners on right of action belonging to firm, neither party

has right to enter retraxit for firm without express consent of other partner. 24 App. 561 (5) (101 S. E. 708).

§ 3176. (§ 2647.) **Surviving partner.**

Continuing business: Surviving partner has no right to continue partnership business as going concern where neither articles of partnership nor will of deceased partner so provides. 147/178 (1) (93 S. E. 289).

Where surviving partner continues partnership business, which is banking business, with consent of devisees and legatees of deceased partner, latter are estopped to raise issue that deposits subsequently received and paid out on firm liabilities existing at death of one of the partners should not be

treated as partnership liability. 147/178 (1) (93 S. E. 289).

Legal representative of deceased partner may be sued in same action with survivor, on contract of the firm. 23 App. 805 (1) (99 S. E. 632).

Parties: Surviving partner was entitled to sue for tort without joining personal representative of deceased partner where articles of partnership stipulated that surviving partner could wind up the business. 143/110 (1) (84 S. E. 428).

ARTICLE 3.

Rights and Liabilities of Partners to Third Persons.

§ 3180. (§ 2651.) **Bound by acts of partner.**

Buying and selling: Where two partners purchase land, taking title in the name of one, both are equitable owners and equitable tenants in common of the land. 143/486 (85 S. E. 703).

Where goods owned by partnership are sold by partner, partnership may recover purchase-price in its own name though purchaser has no knowledge of existence of partnership. 13 App. 457 (1) (79 S. E. 246).

Partner may in behalf of partnership transfer in writing choses in action belonging to firm. 14 App. 209 (3) (80 S. E. 670).

Petition specifically alleging that named firm were, in certain year, engaged in mercantile business, and among other things it was buying and selling cotton, was not subject to demurrer on ground that it was not shown that alleged sale was within scope of business of said firm, it being, in view of allegation as to buying and selling cotton, matter of defense whether or not sale of cotton by defendants was without the scope of the partnership business. 23 App. 675, 676 (2) (99 S. E. 308).

Corporation: Though corporation can not generally be held liable as a partner, it may, as co-adventurer in promotion of proposed corporation, be held liable, as a co-obligor, for any debts created in furtherance of objects for which it was incorporated. 18 App. 128 (3) (88 S. E. 921).

Evidence: Ground of motion for new trial that court erred in permitting witness to testify that certain man was member of certain firm and that he had told witness that certain debt had been paid off, because it was not shown that such man had any authority to make certain statement as member of the firm cannot be considered, since it appears from recitals in such ground of motion that such man was member of a firm, and any statements or admissions made by him as such, and with reference to matters connected with the business would be binding upon the firm. 23 App. 672 (2) (99 S. E. 153).

Negotiable instrument: Partner can bind firm by signing its name to note under seal in course of the business of the firm. 13 App. 640 (2) (79 S. E. 759).

Rights and liabilities of partners to third persons.

Prima facie, execution of negotiable note in name of partnership is within scope of partnership business, and binds firm and individual members thereof. 18 App. 53 (2) (88 S. E. 796).

Promissory note payable to partnership may be transferred upon individual indorsement of all the copartners, without any indorsement in the firm name, as well as in the firm name by any one or more of the partners having authority so to do. 21 App. 741 (5) (95 S. E. 15).

Under law of Florida, which governs contract here, defendant, who was member of partnership engaged in sawmill business, was not liable on note sued on, which was given in

partnership name by his partner, for purchase of stock in corporation; it appearing that note was given without knowledge or consent of defendant, and was not necessary to conduct of partnership business, and not authorized by contract of partnership, and there being no evidence as to course of dealings authorizing or ratifying execution of note. 24 App. 9 (100 S. E. 22).

Pleading: Petition here in action against partners was not demurrable for failure to state cause of action against one partner. 142/305, 306 (1) (82 S. E. 886).

Scope: Any partner may bind other by his acts within scope of firm business. 15 App. 736 (2) (84 S. E. 185).

§ 3184. (§ 2655.) **Purchasing from partner.**

Set-off: In action by partnership for price of partnership property sold by one partner, defendant could not plead a set-off based on contract

made with one partner in his individual capacity. 13 App. 457 (2) (79 S. E. 246).

§ 3185. (§ 2656.) **Indorsements, etc.**

Accommodation indorsement: Petition, in action on note here, was demurrable in view of this section, except as to defendant partner, who signed name

of firm as accommodation indorsers, where authority to so sign was not alleged. 144/485, 486 (3) (87 S. E. 385).

§ 3187. (§ 2658.) **For torts of partner or servant.**

Stated. 14 App. 56 (80 S. E. 297).

§ 3188. (§ 2659.) **Power after dissolution.**

Cited. 15 App. 334, 336 (83 S. E. 158).

Continuing business: Surviving partner has no right to continue partnership business as going concern where neither articles of partnership nor will of deceased partner so provides. 147/178 (1) (93 S. E. 289).

Where surviving partner continues partnership business, which is banking business, with consent of devisees and legatees of deceased partner, latter are estopped to raise issue that deposits subsequently received and paid out on firm liabilities existing at death of one of the partners should not be

treated as partnership liability. 147/178 (1) (93 S. E. 289).

Note: Salesman who is told by former member of partnership that he is no longer a member of the firm, and who goes to the other member of the firm and receives order for goods signed in the firm's name, must report to his firm the information received concerning the dissolution, and his failure to do so would not prevent the member of the firm who had retired from successfully pleading "no partnership," especially when sued upon note given after dissolution, in renewal of the account. 21 App. 576, 579 (94 S. E. 820).

 Limited partnership.

 § 3189. (§ 2660.) **Disposition of assets among creditors.**

Mortgage of firm may be attacked by holders of liens against partners, covering same property, in order to obtain priority of payment of claims,

when both the firm and the partners are insolvent. 140/39 (3-b) (78 S. E. 460).

 § 3190. (§ 2661.) **Garnishment on partner's interest.**

Note: Rights of plaintiff not affected by amendment to plea showing that defendants signing note sued on signed separately, not collectively, since judgment against partnership would bind

not only assets of partnership, but also individual property of partners, and interest of either in partnership might be reached by garnishment. 18 App. 206, 207 (3) (89 S. E. 156).

 ARTICLE 4.

Limited Partnership.

§ 3202. (§ 2673.) **Alteration of names, etc., deemed a dissolution.** [Except as provided in this section, every alteration made in the names of the general partners, in the nature of the business, or in the capital or shares thereof contributed, held, or owned or to be contributed, held, or owned by any of the special partners, or the death of any partner, whether general or special, dissolves the limited partnership, or if such partnership be continued, constitutes such partnership a general partnership in respect to all business transacted, after such alterations or death, unless the articles of partnership provide that in the event of the death of a partner the partnership may be continued by the survivors, in which case it shall be so continued with the consent of the personal representatives of the deceased partner, and the personal representative may succeed to the partnership rights of such deceased partner and continue the business the same as if such partner had remained alive. But any special partner may from time to time increase the amount of capital stock contributed, held, or owned by him, or one or more special partners may be added to the partnership, on actually paying in an additional amount of capital, to be agreed on by the general and special partners, and on filing in the office of the clerk with whom the original certificate was filed an additional certificate of the general partners, in the partnership name verified by the oath of one of them, stating the increase of capital stock, and by whom, and the names and residences of such additional special partners, and whether of full age, and the amounts contributed by each to the common stock, together with the affidavit of one or more of the general partners stating that the amounts specified in such additional certificates have been actually and in good faith paid in cash; and such alteration does not make the partnership general. No additional publication of the terms of the partnership, nor

Debtor and creditor; general principles; relation defined, etc.

of the alteration thereof, is required in any of the cases provided in this section. Any special partner, or the legal representative of any such special partner deceased, may sell his interest in the partnership or any portion thereof without working a dissolution thereof or rendering the partnership general, if a notice of such sale be filed within 10 days thereafter in the office of the clerk with whom the original certificate of partnership was filed, and the purchaser thereof thereupon becomes a special partner, with the same rights as on original special partner.] (a)

(a) Acts 1919, p. 96.

General Note on Partnership.

Bankruptcy: Fact that one appointed receiver, to hold funds subject to order of court, and firm of which he was member, were declared bankrupts, after he had turned receiver-

ship funds over to firm, did not exempt him from rule to pay over funds on demand of creditors of estate of which he was receiver. 144/54 (86 S. E. 215).

CHAPTER 2.

Debtor and Creditor.

ARTICLE 1.

General Principles.

SECTION 1.

Relation Defined, etc.

§ 3215. (§ 2686.) Relation of debtor and creditor.

Bankruptcy: Under bankruptcy act of July 1, 1898, discharge in bankruptcy releases bankrupt from all his provable debts except those specifically mentioned in Section 17 thereof, which includes those which have not been duly scheduled in time for proof and allowance with name of creditor if known to bankrupt, unless such creditor had notice or knowledge of bankruptcy proceedings. 24 App. 386 (2) (100 S. E. 776, 44 A. B. Rep. 437).

Where evidence showed that indebtedness sued on, which was provable in bankruptcy, was in existence at time one of defendants filed petition in bankruptcy, and such defend-

ant introduced in evidence certified copy of his discharge, it was not error to direct verdict in his favor, there being no insistence on part of plaintiff that it did not have notice or actual knowledge of proceedings in bankruptcy or that debt and name of creditor were not duly scheduled. 24 App. 613, 641 (1) (101 S. E. 696, 44 A. B. Rep. 563).

Creditor: While the generic meaning of the term "creditor" is that stated by this section, its meaning, as used in section 2220, denotes the holder of an obligation arising *ex contractu*. 142/789 (83 S. E. 852).

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§ 3218. (§ 2689.) **Attacking judgments.**

Cited. 143/572, 579 (87 S. E. 760).

§ 3220. (§ 2691.) **Compulsory election.**

Scope of rule: Election of pledgee as to which of several collateral securities shall be resorted to to enforce unpaid debt is subject to equitable principle known as marshaling securities; this rule has no application to debtor and creditor. 142/727 (83 S. E. 657).

Equitable remedy of marshaling securities will not be so extended as

to delay or inconvenience creditor in collection of debt secured by collateral notes, by confining him to particular collaterals at instance of one whose note is included among the collaterals and who claims equitable set-off against payee of his note. 147/96 (2) (92 S. E. 879).

SECTION 2.

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§ 3222. (§ 2693.) **Obligations which must be in writing.**

2.

Stated. 19 App. 486 (91 S. E. 783).

Amount: Where one assumes to pay definite amount of indebtedness of another, it is none of his concern whether debt thus assumed is greater or less than actual indebtedness. 18 App. 401, 402 (6) (89 S. E. 436).

Concurrence in agreement: Where A agrees orally to pay to B a debt which C owes to B, to take the transaction without the operation of the statute of frauds it must appear that A, B and C concurred in such agreement. 20 App. 102 (2) (92 S. E. 653).

Consideration: There can be no recovery for breach of oral promise to pay another's debt where other party to contract has not either partly or wholly performed it by furnishing in whole or in part consideration which induced promise. 14 App. 183 (80 S. E. 526). See 15 App. 794 (84 S. E. 226).

Promise to pay debt of another is void, when there is no subsequent detriment to creditor or benefit to debtor. 14 App. 661 (2) (82 S. E. 161).

Permission to pay pre-existing debt of another without detriment or inconvenience to creditor or benefit to debtor is mere nudum pactum. 17 App. 799 (1) (88 S. E. 689).

Though creditors delayed taking legal steps to protect interest by reason of defendant's promise to pay debt of another, where it does not appear that debt of original debtor became unenforceable, creditors did not suffer such detriment as would constitute consideration for promise. Id. 799 (1-b).

Promise to pay existing debt of another, which has only love and affection for consideration and which is executory, and from which no benefit accrues to promisor or to debtor, is nudum pactum and cannot be enforced. 146/778 (92 S. E. 640).

Corporation: Stockholder's parol promise to answer for debts of corporation when made as inducement to sale of all corporate stock was not enforceable in action at law. 17 App. 470 (87 S. E. 693).

Promise by defendant to pay to plaintiff debt due plaintiff by a corporation in which both of them were stockholders and officers is within statute of frauds, in absence of showing of any official act of the corporation agreeing to substitution of defendant as debtor, or that plaintiff and defendant had any authority to act for the corporation in the trans-

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action, or that corporation was ever legally dissolved. 20 App. 102 (2) (92 S. E. 653).

Credit to promisor: This section does not apply where both parties were primarily liable. 17 App. 382 (87 S. E. 157).

Contract in consideration of third person being allowed to take possession of and remove certain property from premises of B to premises of A, he to be responsible for amount due by third person to B as soon as amount could be ascertained, was original undertaking. 17 App. 391 (1) (87 S. E. 152).

Where a person tells another to let a third person have goods, and that he will see that the debt is paid, and credit is accordingly given the promisor, the promise is an original and not a collateral undertaking, and is not within the statute of frauds. 19 App. 156 (1) (91 S. E. 239).

Where one person tells another to let a third person have goods, and that he will see that the debt is paid, in order that the promisor shall become bound, it is requisite that the credit shall be given exclusively to the promisor. 19 App. 156 (2) (91 S. E. 239).

Where a promisor, by contract with seller, renders himself solely responsible for sale of goods furnished to another, and seller so enters sale and charges items upon his books of account, jury may find accordingly even though party to whom goods were actually furnished was ignorant of such contract between promisor and seller, and regarded himself as sole purchaser. 19 App. 156 (3) (91 S. E. 239).

Where evidence authorized jury to find that goods were furnished to cropper of defendant solely on defendant's credit, and upon an original and not a collateral undertaking had between plaintiff and defendant, promise of defendant was binding, and does not come within inhibition of statute of frauds. 21 App. 21 (2) (93 S. E. 498).

Testimony by plaintiff's representative that his recollection was that K. said to him to let T have certain goods, and he would see that such representa-

tive got his money, and that such representative charged the account to T. and K., and that he was looking to both of them for the money, and that in a conversation between him and K., in the presence of another, K. said that he did not tell such representative that he would pay for the goods, but he told him that he would see that such representative got his money, did not authorize finding that K.'s contract was an original undertaking. 21 App. 157 (93 S. E. 1017).

Dividends: Oral guaranty of seller's agent that corporate stock sold would pay a dividend of 25%, is not enforceable under the statute of frauds, and hence can afford no basis for rescission by the buyer. 13 App. 772, 775 (80 S. E. 32).

Guaranty: Where defendant stated to a prospective vendor that if shipments were made to a third person he would guarantee payment, the promise was in the nature of a guaranty and not binding when not in writing. 141/48 (80 S. E. 285).

Identification: Writing relied on to satisfy this provision must, either itself or in connection with other writings, identify the debt which is subject of the promise, without aid of parol evidence. 20 App. 102 (3) (92 S. E. 653); 24 App. 496 (1) (101 S. E. 194).

Indemnify: Promise to indemnify another for becoming security is not within this section, and need not be in writing, and promisee may recover all moneys he was compelled to pay by virtue of bond entered into and where person induced by promise of indemnity to sign bond voluntarily pays amount to discharge liability before it has been legally fixed, he cannot recover sum paid from promisor. 17 App. 803 (1) (88 S. E. 690).

Nonsuit: Where plaintiff's evidence clearly showed promise by defendant to answer for debt, default, or miscarriage of another, and such promise was basis of suit, and plaintiff's evidence further showed that promise had never been in writing, defendant's motion for nonsuit, expressly based on this ground, should have been sustained. 19 App. 657 (2) (91 S. E. 999).

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Notes: Where, for valuable consideration, original undertaking is entered upon by new promisor, fact that in so doing he agreed to execute notes in settlement of debt, which he fails and refuses to do, would not operate to relieve such promisor from his obligation, but upon such default he becomes liable for the debt so assumed, in the manner and to the extent of his agreement. 21 App. 44 (3) (93 S. E. 510).

Substitution: Agreement of creditor, debtor, and one owing the debtor, that the last named should pay the debtor's debt to the creditor and the debtor be released, not within statute of frauds. 140/768 (1) (79 S. E. 841).

Promise to answer for debt of another does not include original undertaking for valuable consideration to substitute promisor for original debtor and release latter. 17 App. 799 (1) (88 S. E. 689).

Where creditor, debtor, and third person owing debtor agree in parol that such third person shall be substituted for debtor and latter released, case is not within this section, but third person becomes debtor by substitution. *Id.* 799 (2).

Oral promise to pay debt of another from funds belonging to debtor in hands of promisor is not, for that reason, any more enforceable than if promisor agreed to discharge with his own money. 18 App. 207 (1) (89 S. E. 79).

Agreement between creditor, his debtor, and third person, whereby said third person, in consideration of creditor's releasing debtor, agrees to pay amount of debt to creditor, and creditor releases debtor and agrees that said third person shall be substituted for debtor, is not within statute of frauds; especially is this true where original debtor, tenant of creditor, is in possession of property

4.

Bond for title: Acceptance of deed obligating grantee to pay purchase money owing by grantor under bond for title created agreement to pay such price, which was not within statute of frauds. 140/435 (4) (79 S. E. 196).

on which creditor has lien, which is waived by creditor in consideration of promise of third person. 19 App. 456 (1) (91 S. E. 793).

This provision does not include an original undertaking whereby a new promisor, for a valuable consideration, substitutes himself as the party who is to perform, and the original promisor is thereby released. 21 App. 44 (1) (93 S. E. 510).

To take transaction, whereby purchaser of property subject to execution requested holder of execution not to levy and verbally promised to pay *fi. fa.* in full, out of statute of frauds, it must appear that purchaser was by agreement between creditor, debtor, and himself substituted for original debtor, and that latter was released. 24 App. 240 (100 S. E. 643).

Suretyship: Where original debtor was not released no detriment resulted to creditors from promise to pay debt; obligation was one of suretyship and should have been in writing. 17 App. 799 (1-a) (88 S. E. 689).

Where storekeeper lets A have goods, on verbal promise of B that he will see that the debt is paid, and storekeeper charges account to both A and B, and, upon failure of both to pay the account, files suit against both, the contract, so far as B is concerned, must be construed as merely one of suretyship and not an original undertaking; and B's promise to pay, not having been made in writing, is void and not binding upon him. 21 App. 309 (1) (94 S. E. 328).

Time: It was not error to exclude testimony of defendant in which he endeavored to explain his good faith in failing to pay account for goods furnished to third person upon his promise to pay for same, where it appeared that such promise related to a date subsequent to that of the sale. 19 App. 156 (4) (91 S. E. 239).

Boundary line: Unascertained or disputed boundary line between adjoining landowners may be established by oral agreement; such agreement is executed so as to be binding when such owners procure surveyor to survey and

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definitely mark out line agreed upon, or themselves do so. 23 App. 800 (1) (99 S. E. 540).

Dedication: Petition to compel dedicators to execute deed pursuant to agreement to donate land for public purposes was not demurrable for failure to allege that agreement was in writing, and did not contain sufficient facts to take agreement out of statute of frauds. 144/688 (2) (87 S. E. 917).

Description: Option contract, describing land as "All of my entire property according to my tax returns of 1909 and 1910, also the Central Hotel," and reciting, "This is meant to cover all my real and personal property both of every description in the city of Sylvester, whether improved or unimproved," failed to identify property, and court did not err in dismissing action on such contract on demurrer. 19 App. 53 (90 S. E. 1035).

5.

Evidence that price fixed by contract of sale proven by condemnor was in further consideration that condemnor should have certain ferry privileges of which condemnation would deprive him was not objectionable on ground that it concerned parol agreement not to be executed within year. 141/643 (5) (81 S. E. 882).

Hiring: Verbal contract for services which are to begin at future date and continue for period of a year is void, unless party claiming its invalidity has accepted some benefit thereunder, to the loss or injury of the other party, by reason of such part performance of some act essential to the contract as would take it out of the operation of the statute; advance of money under the contract is sufficient to so operate. 21 App. 44 (2) (93 S. E. 510).

Plaintiff's relinquishment in defend-

7.

Cited. 18 App. 86, 87 (1) 88 S. E. 906).

Acceptance: where letters written by defendant company and its agent to plaintiff did not constitute an absolute, unconditional, and unequivocal accep-

Growing trees: Parol contract between owner of growing timber and another whereby latter was to immediately cut timber making merchantable cross-ties, owner to receive stated amount for each tie, and contract to be completed as soon as practicable, was one for sale of growing trees standing upon land, which should be in writing. 148/633 (1) (97 S. E. 671).

Payment: Oral agreement here relative to division of land purchased and payment therefor was not void for want of consideration, though sale contract was void under this section. 143/379 (1) (85 S. E. 125).

Public sale: Agreement that one should purchase land at administrator's sale and take deed, and that on other's payment of price he would execute bond conditioned to convey the land, was within statute of frauds, and equity will not decree specific performance. 146/822 (92 S. E. 635).

ant's favor of his contract of employment with another, by terms of which contract the laborer had agreed to apply half of his wages in payment of pre-existing debt owing by laborer to plaintiff, furnished valid consideration on which assumption of such debt by defendant could be made; especially is this true where laborer did not himself repudiate contract, but offered to return and carry out contract, in event that agreement was not had in reference thereto between plaintiff and defendant. 21 App. 44 (2) (93 S. E. 510).

Possibility: Oral promises to charitable corporation to give specific sum for construction of building to be devoted to carry out the design of such corporation, as soon as the work begins, is not within the statute of frauds as the contingency could occur within a year. 140/291, 292 (2) (78 S. E. 1075).

tance of his offer to buy from defendant certain goods of agreed value, more than \$50, there was no valid and enforceable contract between the parties. 21 App. 114 (1) (93 S. E. 1023).

This section does not apply where

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buyer, after receiving full shipment of merchandise in accordance with unsigned contract, shall accept and actually retain, under terms of contract, part of goods received. 21 App. 435 (94 S. E. 640).

Where bill of goods consisting of 190 suits of value of \$1,039.50 was sold and order made out by plaintiff's salesman was not signed, but was subsequently filled by shipment of entire purchase, defendant accepting and retaining 49 of the suits under contract as made, and subsequently returned remainder, it was error, in action for purchase price, to grant nonsuit on ground that contract, not being in writing, came within this section, and was therefore void. 21 App. 435 (94 S. E. 640).

Where A signed a writing agreeing to deliver to B, at stated time and place and at price named, goods exceeding in value \$50, but B did not agree in writing to pay therefor, and after time for delivery had passed B tendered price and demanded goods, B could not maintain against A action for damages for failure to deliver at time and place fixed, B's right depending upon his doing some act prior to the time fixed for delivery which would bind him to pay in event of delivery. 24 App. 765 (3) (102 S. E. 185).

Agent: Broker's memorandum as to sale of property is sufficient evidence of contract to satisfy statute of frauds and to create binding contract between the parties. 19 App. 21 (4) (90 S. E. 1037).

Where defendant company, by testimony of its president, admitted that it authorized plaintiff's agent to sign its name to order for goods, issue raised by defendant's plea of statute of frauds was thereby eliminated. 19 App. 195 (2) (91 S. E. 245).

Where defendants never signed written agreement for purchase of goods of value of more than \$50, ordered from plaintiff's salesman, so as to comply with statute of frauds, and it did not appear that plaintiff ever entered into any written agreement to sell the goods, there was no legal, binding contract, and it was error to overrule motion for new trial after plaintiff had

obtained judgment. 24 App. 765 (4) (102 S. E. 185).

Approval of principal, when required to complete sale made by agent, must be in writing, where price exceeds \$50.00, though buyer pays agent \$1.00 as part of purchase price. 13 App. 485 (1) (79 S. E. 376).

Where traveling salesman takes order subject to his principal's approval, if contract relates to goods, wares, or merchandise to amount of \$50 or more, approval must be in writing before contract becomes mutual. 24 App. 765 (2) (102 S. E. 185).

Charities: Oral promises to charitable corporation to give specific sum of money for construction of building, to be devoted to carrying out the design of such corporation, as soon as the work begins, is not a subscription to shares of stock of a commercial corporation, and is not within the statute of frauds. 140/291 (1) (78 S. E. 1075).

Contract: Where writings set out in petition did not make complete contract between parties, and agreed price of goods under alleged contract was over \$50, trial judge properly sustained demurrer to petition, based upon ground that contract was within statute of frauds, and was therefore unenforceable. 21 App. 114 (3) (93 S. E. 1023).

Corporations: Promoter's parol agreement to repurchase stock from subscriber was not enforceable. 142/457 (2) (83 S. E. 104).

Petition alleging that defendant, being desirous of forming corporation, induced plaintiff to subscribe for stock under agreement that if plaintiff would subscribe defendant would do certain things, that with this assurance and guarantee, made by said defendant in parol, petitioner subscribed for said stock, etc., was subject to demurrer, on ground that contract rested in parol. 22 App. 92 (95 S. E. 378).

Cotton: Where buyer of cotton of value of \$13,000 neither accepted nor received any portion thereof, and neither gave earnest money to bind the bargain nor paid any part of the purchase price, such contract was not taken out of the statute of frauds. 20 App. 673 (2) (93 S. E. 254).

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Description: Where contract involved is one that is covered by the statute of frauds, the complete contract, including an adequate description of the property purchased, must be in writing. 21 App. 160, 161 (5) (93 S. E. 1018).

Writing itself furnishes sufficient description of property purchased, when it serves to separate it from the mass or gives such description as will render it capable of identification. 21 App. 160, 161 (5) (93 S. E. 1018).

Evidence: Only plea in action on note being failure of consideration, parol evidence that plaintiff sold mill to defendant for \$600 was not objectionable on ground that contract of sale was not in writing. 142/262 (2) (82 S. E. 643).

Executed contract: Where contract has been fully executed, statute of frauds does not apply. 21 App. 160, 161 (5) (93 S. E. 1018).

Possession: Executory agreement for sale of goods to be actually delivered at future day is valid, though at time of making contract seller has not the goods in his possession, has not contracted to purchase them, and has no expectation of acquiring them otherwise than by producing, manufacturing, or purchasing them at some future time before day of delivery. 22 App. 753 (1) (97 S. E. 251).

8.

Cited. 18 App. 377, 383 (89 S. E. 454).

General Note.

Cited. 15 App. 794, 795 (84 S. E. 226).

Agent: Seller of goods under contract within statute of frauds could not act as agent of buyer in making and signing memorandum so as to bind the buyer; neither could sales agent of selling corporation also act for buyer in making and signing memorandum of contract so as to bind buyer, though it were done in presence of buyer. 145/836 (3) (90 S. E. 61).

Certainty: Where petition in action by purchaser for profits on resale, fairly construed against pleader, sufficiently indicated that only written contract

Rescission: Application by buyer of sum paid seller as part of purchase-price of lumber in question in trover suit to entirely different contract between the parties, by and with the consent of the seller, amounted to a withdrawal or rescission of the partial payment made under the parol agreement, and rendered the contract for the sale of the lumber (valued at more than \$50) unenforceable under the statute of frauds, to which it constituted no exception. 22 App. 709 (97 S. E. 103).

Terms: Where terms of sale are agreed upon and the bargain struck, and everything that the seller has to do with the goods is completed, the contract of sale becomes absolute and the property rests in the buyer. 21 App. 160, 161 (5) (93 S. E. 1018).

Work and labor: In determining whether a given contract is for sale of goods, or whether it is for work and labor to be done, test to be applied is whether primary purpose and intent of agreement are merely to provide for delivery of articles contracted for, or whether essential consideration is work and labor to be done at instance of employer and for his use and benefit; that is to say, is the labor of the producer to be expended for his employer, or for himself. 22 App. 753 (2) (97 S. E. 251).

relied on consisted of written receipt of \$10, embodied in petition, which receipt, when sought to be treated as contract of sale, was void for uncertainty, general demurrer to petition was properly sustained. 24 App. 480 (2) (101 S. E. 312).

Charge: Where statute of frauds was not pleaded, there was no error in failing to charge on the subject because of parol request to do so. 145/614 (1) (89 S. E. 679).

Parol evidence: Written memorandum or agreement relied on cannot depend upon parol evidence to supply necessary or additional portions of contract, but must be complete in itself. 14 App. 515 (3) (81 S. E. 593.)

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Pleading: Petition setting out terms of contract not demurrable because not alleging it to be in writing. 140/51 (1) (78 S. E. 413).

Petition in action for breach of contract to sell and deliver cotton here did not show contract of bargain and sale sufficient to meet requirements of statute of frauds. 141/713, 714 (2) (82 S. E. 29).

Amended petition showing that contract sued on was not in writing and was for sale of goods to amount of more than \$50, was demurrable, there being no allegation of part performance, or anything relieving contract from operation of statute. 17 App. 437 (87 S. E. 607).

Failure of petition for specific performance of contract to allege that contract was in writing cannot be taken advantage of by demurrer; such failure raises no presumption that contract exists only in parol. 147/30 (2) 92 S. E. 636).

Where statute of frauds was not pleaded, and there was no demurrer, motion for nonsuit, or objection to testimony, so as to invoke ruling on that subject, reviewing court will not grant new trial on ground that verdict is contrary to law because it appears that contract sought to be enforced should have been in writing. 148/276 (1) (96 S. E. 499).

§ 3223. (§ 2694.) Exceptions.

2.

Cotton: Where original contract, which was for purchase of cotton for amount more than fifty dollars, and which was put in writing, was subsequently modified by parol agreement, and under such modified contract plaintiff delivered 125 bales of cotton to defendant, who retained 47 bales and paid plaintiff for them, there was such partial performance of the modified contract as to take it out of the statute. 18 App. 86, 87 (2) (88 S. E. 906).

Land: Oral agreement here for division of land purchased and for payment therefor was not void, but fell within this exception, where there

As general rule, for defendant to avail himself of statute of frauds he must specially plead it; however, in absence of plea defendant can avail himself of defense by timely motion to nonsuit the case. 19 App. 657 (2) (91 S. E. 999).

Defense of statute of frauds cannot be raised by demurrer unless petition affirmatively shows that contract is oral. 20 App. 816 (2) (93 S. E. 496).

Defense of statute of frauds can be raised by demurrer to petition only when facts alleged in petition affirmatively show that contract is oral and that there has not been such performance as to raise an exception. 22 App. 737 (97 S. E. 194).

Separate: Two writings in identical form, containing terms of executory contract of purchase and sale of personalty by named parties, and each identified by same contract number and purporting within itself to be duplicate of another to be signed by opposite party, can, when so executed, be connected together, without aid of parol testimony, and thus meet requirements of statute of frauds. 22 App. 467 (2) (96 S. E. 581).

Waiver: Defendant does not waive his right to plead statute of frauds by also pleading recoupment for breach of contract sought to be enforced by plaintiff. 143/127, 128 (2-a) (84 S. E. 559).

had been performance on one side and acceptance by the other. 143/379, 380 (2) (85 S. E. 125).

Contract for rental of land set up in petition here which extended for more than one year was taken out of the statute by allegation in petition of full performance on part of plaintiff. 22 App. 723 (1) (97 S. E. 199).

Pleading: Though petition showed that contract was oral, where it further showed full performance thereof on the part of plaintiff, which was accepted by other party to contract, such contract did not fall within statute of frauds. 21 App. 820 (2) (95 S. E. 313).

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3.

Applied. 19 App. 269 (1) (91 S. E. 286).

Stated. 142/551 (83 S. E. 137).

Acceptance: Though petition showed that contract was oral, where it further showed full performance thereof on the part of plaintiff, which was accepted by other party to contract, such contract did not fall within statute of frauds. 21 App. 820 (2) (95 S. E. 313).

Debt of another: There can be no recovery for breach of oral promise to pay another's debt where other party to contract has not either partly or wholly performed it by furnishing in whole or in part consideration which induced promise. 14 App. 183 (80 S. E. 526).

Amendment to petition, alleging complete performance by one party to contract to pay debt of another, brought case within this exception. 15 App. 794 (1) (84 S. E. 226).

Goods: Before recovery may be had upon contract for sale of goods of value of more than fifty dollars, contract must be in writing, or there must be part performance or payment of earnest money, or some memorandum which is specific as to parties and terms, etc. 23 App. 222 (97 S. E. 892).

Land: Oral contract to devise lands falls within statute of frauds; but where party in whose favor will is to be made has performed his part of contract, and promisor dies leaving will in which no devise is made pursuant to oral contract, disappointed party may apply to court of equity for specific performance of contract. 145/682, 683 (5) (89 S. E. 749).

Fact that purchaser of standing trees, under parol contract to cut and manufacture timber into cross-ties, had expended money in procuring hands whereby to cut and remove the trees, had purchased ox with which to move the trees, and had also cut part of the trees, was not such part performance as took contract out of operation of statute of frauds. 148/633, 634 (2) 97 S. E. 671).

Different degrees of proof are required to support the proposition that there was a parol contract and the proposition that parties entered into possession of land and made valuable improvements thereon upon faith of contract; former is to be established so clearly as to leave no reasonable doubt in minds of jury, while latter may be established by preponderance of the evidence; while charging upon latter it is proper to read sections 5731 and 5732, but in charging upon former it is better to omit reference to preponderance of evidence. 149/290, 291 (2-a) (99 S. E. 872).

Charge in suit by widow as personal representative of deceased husband to recover land alleged to be his at time of death, that the burden is on the defendants to prove by preponderance of the evidence that they were put in possession of land at time or after alleged parol contract was made, that they were put in possession by the deceased, with reference to the parol agreement, as their own property, that they accepted it in this manner and went forward and put valuable improvements upon it and in every respect complied with obligations resting upon them under the alleged parol contract, was not error. 149/290 (2) (99 S. E. 872).

Whenever parol contract for sale of lands has become partly performed to extent that it would be fraud on part of seller to repudiate the agreement, purchaser is not prevented from recovering damages for its breach. 24 App. 480 (1) (101 S. E. 312).

Allegations of petition merely showing that plaintiff paid \$10 on purchase price of land bought under parol contract, and that he proceeded to bargain land to another at named profit, which he seeks to recover, averments are not sufficient to show such part performance of contract as would prevent it from falling within statute of frauds, and would not authorize maintenance of claim for damages for its breach. 24 App. 480 (1) (101 S. E. 312).

Acts void as against creditors.

General Note.

Cited. 18 App. 377, 383 (89 S. E. 454).

Modification: Ordinarily, contract which must, under statute of frauds, be in writing, and which is actually put in writing, can not be subsequently modified by parol agreement; but where modified contract has been fully executed, or where there has been performance on one side, accepted by other in accordance with contract, or where there has been such part performance

as would render it a fraud in party refusing to comply if court did not compel performance, contract is taken out of statute. 18 App. 86 (1) (88 S. E. 906).

Pleading: Where suit is brought to compel specific performance of parol contract for land, and no facts are alleged to bring case within any of the exceptions to statute of frauds, petition is demurrable. 147/15 (1) (92 S. E. 531).

ARTICLE 2.

Acts Void as Against Creditors.

§ 3224. (§ 2695.) Void acts.

2.

Administrator: Where debtor, to defraud his creditors, conveys his property to another, his administrator cannot maintain equitable action against such grantee to recover property for purpose of paying creditors of decedent. 147/734 (2) (95 S. E. 247).

Admissions: Court erred in charging that if conspiracy or scheme to defraud was shown, any admission by parties to fraudulent scheme might be considered by jury, without qualifying such instruction by adding that only admissions made pending the conspiracy or fraudulent scheme should be considered, and not those made after conspiracy was terminated or fraudulent scheme was executed. 148/369 (7) (96 S. E. 962).

Bankruptcy: Trustee in bankruptcy of debtor is vested with right of action of creditors with respect to property fraudulently transferred by bankrupt, and may, on their behalf, assail such transfers to same extent as though debtor had not been declared bankrupt. 144/377 (4) (87 S. E. 293).

Where one conveys property to another under circumstances which render conveyance void, and shortly thereafter is adjudicated bankrupt, right to have property brought to sale as part of assets of bankrupt's estate is in trustee in bankruptcy; individual

creditors cannot maintain suit to have void conveyance canceled and property brought to sale to satisfy their demands, without showing that they have moved in the bankruptcy court to have trustee proceed against property or that he has refused to take steps to subject property and administer same as part of estate. 146/400 (1) (91 S. E. 412; 38 A. B. Rep. 824).

Where, under the evidence, only conclusion which could have been reached was that transfer which trustee in bankruptcy sought to set aside, by which, within four months prior to filing of petition in bankruptcy, bankrupt's brother was substituted in his place as purchaser of land under bond for title from another, was a bona fide sale, in which there was no purpose to defraud creditors, court did not err in directing verdict for defendants. 24 App. 270 (100 S. E. 649; 44 A. B. Rep. 349).

Burden of proof is on husband and wife to show that deed from husband to wife was not made to hinder, delay, or defraud creditors. 148/596 (1) (97 S. E. 528).

Where fraud is charged by creditor as to transaction between husband and wife, it was error for trial judge to omit to charge that onus is on husband

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and wife to show that transaction was fair. 147/11 (92 S. E. 521).

Charge in claim case here embodied principle of this section. 144/270 (2) (87 S. E. 3).

Error here in claim case to charge that claimant's deed would be void as against creditors if she had reasonable ground to suspect that conveyance to her grantor was made to delay or defraud creditors. 145/503 (1) (89 S. E. 520).

Where there was an issue whether conveyance by husband to wife was made to delay or defraud creditors, jury should be instructed, without request, that if conveyance was made to delay or defraud any creditor or creditors of grantor, it will bind them and will not be set aside at his instance. 145/806 (2, 3) (89 S. E. 1080).

Where there is issue whether conveyance by husband to wife was made to delay or defraud creditors, there being evidence that there were more creditors than one when conveyance was made, court should not limit consideration of jury to question whether conveyance was made to delay or defraud one certain creditor. 145/806 (2, 3) (89 S. E. 1080).

In suit by judgment creditor to cancel deed made by debtor to his wife, on ground that it was executed for purpose of hindering and delaying creditors, and executed without consideration, instruction held erroneous as excluding from consideration of jury question whether deed was made for purpose of defrauding creditors. 147/473 (2) (94 S. E. 580).

In suit by judgment creditor to cancel deed made by debtor to his wife, on ground that it was executed to hinder and delay creditors, error in instruction excluding question of whether deed was made for purpose of defrauding creditors was prejudicial, though in previous part of charge judge properly instructed jury upon general principle that deed between husband and wife, made to hinder and delay creditors, would be void as against creditors. 147/473 (2-a) (94 S. E. 580).

Charge in suit against corporation and sole stockholder that bona fide transfer upon valuable consideration

between parties would not be void, and defining bona fide transaction, was not erroneous on ground that it was unsupported by evidence and failed to distinguish between creditors of corporation and creditors of sole stockholder. 148/369 (3) (96 S. E. 962).

Court did not err in giving jury instructions under which they would be authorized to find that fraudulent transfer of property by member of firm was void as against suit by trustee appointed in bankruptcy proceedings against the firm. 148/369 (5) (96 S. E. 962).

Corporation: Transfer of property by corporation in consideration of certain shares of its capital stock, though such transfer might have been void as to existing debts of corporation, was not void as against subsequent creditors, if not made for purpose of defrauding those who might become creditors. 149/701 (1) (101 S. E. 803; 44 A. B. Rep. 617).

Evidence held admissible to show that credit extended on faith of husband's representation that he owned lot. 140/45 (78 S. E. 335).

Notes signed by sureties and paid by plaintiff were admissible in evidence in action by surety against co-surety for contribution and to subject to plaintiff's claim property fraudulently conveyed by defendant, though dated subsequent to the date of the conveyance, especially where deed was not filed until after the execution of note. 142/243 (1) (82 S. E. 641).

Evidence that one note was given in lieu of another was admissible on question of defendant's fraudulent intent in voluntarily conveying the property to his wife and children. Id. 243 (3).

Plaintiff's testimony of transaction between him and defendant several years prior to action was admissible to show defendant's financial condition before execution of the conveyance, though contract concerning which plaintiff testified was not binding because not in writing. Id. 243, 244 (4).

Evidence here made out prima facie case of ownership in debtor and of effort to hinder, delay and defraud creditors. 142/422 (1-c) (83 S. E. 99).

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Where evidence was sufficient to authorize jury to believe that transfer of property was to hinder or defraud creditors, motion for new trial based on general grounds that verdict was contrary to law and evidence, and without evidence to support it was properly overruled. 145/439 (89 S. E. 409).

On question whether transfer from husband to wife was in good faith, competent for husband to testify as to intent, testimony to be considered with all evidence bearing on question. 145/452, 453 (6) (89 S. E. 411).

On issue as to good faith of defendant in *fi. fa.* in making conveyance, his solvency or insolvency at time of making conveyance is relevant; but range of evidence as to time should be so restricted as to show financial condition of grantor at time of making deed. 145/503 (2) (89 S. E. 520).

Execution: On trial of equitable action to set aside alleged fraudulent sales of property and to subject property to payment of plaintiff's debt in execution, it was not cause for excluding execution from evidence that in one respect it did not technically follow judgment on which it issued. 148/652 (2) (98 S. E. 76).

Husband and wife: Creditors seeking by equitable petition to cancel deed made by husband to wife, it is necessary to make the grantor a party defendant. 140/415 (1) (78 S. E. 1082).

Where son *bona fide* gives to mother account due him by his father, and with knowledge of gift and in pursuance thereof father in good faith executes to donee deed to real and personal property on consideration of payment of debt, such executed transaction will constitute valid transfer of account and furnish valuable consideration in support of deed. 148/246 (1) (96 S. E. 427).

Conveyance by husband to wife of property in sum grossly in excess of amount due to her amounts to conveyance made with intent to hinder, delay, and defraud creditors, within legal conception of that term, and this is true notwithstanding both husband and wife claim to have acted in good faith. 148/429 (4) (96 S. E. 867).

Portion of charge asserting that plaintiff must show that deed from husband to his wife was made in contemplation of insolvency was not error which was cause for new trial. 149/763, 764 (7) (102 S. E. 146).

Intent: It was error requiring new trial for court to charge that if jury believed that at time of making of deed, if such deed was made, it was made for purpose of hindering, delaying, or defrauding creditors of defendant, and that such intent was known to claimant, jury would be authorized to find property subject to executions. 148/244 (96 S. E. 430).

To avoid conveyance made by one alleged to be insolvent at its date, for purpose of hindering, delaying, and defrauding his creditors, so as to subject property to claims of subsequent creditors, it should appear that conveyance was made with actual intention of defrauding such subsequent creditors. 148/369 (6) (96 S. E. 962).

Knowledge: Transfer of substantially all the assets of debtor company was fraud on creditors such as made transferee company trustee *ex maleficio* as to such creditors to extent of value of assets. 143/254 (84 S. E. 444).

Notice: Charge that if defendants took property in good faith with no suspicion even of purpose to defraud, if there was no such purpose, then they would be protected, was erroneous. 148/652 (5) (98 S. E. 76).

If defendant sells his property in order to prevent creditors from making their claims out of it, sale will be void as to him; and if at time of sale purchaser has reasonable ground to suspect that such is his object, sale will be void also as to purchaser. 23 App. 634 (3) (99 S. E. 154).

Partnership: Where partner while indebted conveyed land to his wife, which creditors sought to subject to his debt, cross-examination of creditor was improperly denied as to property which had been sold as firm property, where it was expected that answer would show solvency of firm and of its members. 145/452 (2) (89 S. E. 411).

Petition alleging that a partnership, and partners composing the firm, dur-

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ing certain year became indebted to petitioner in sum of \$812.00, besides interest, for which sum petitioner obtained judgment against partnership and members thereof, upon which execution was issued and was unsatisfied, that one partner executed to his wife warranty deed to property at stated consideration of \$1000, that property was worth many times that amount, that both firm and maker of deed were insolvent, and that conveyance was made with intent to delay, hinder or defraud creditors of partnership as well as creditors of such partner, among whom was petitioner, which intention was known to wife, was not subject to demurrer on ground that plaintiff had complete and adequate remedy at law. 149/763 (1) (102 S. E. 146).

Pendency of suit: Fact that suits were pending against vendor at time of selling his property is circumstance which jury may consider on trial of issue as to whether sale was fraudulent as against his creditors. 23 App. 634 (4) (99 S. E. 154).

Possession: Charge that if jury should find that ancestor of defendants had made absolute deed to ancestor of plaintiffs, and had surrendered possession of land, defendants could not attack validity of such conveyance, was not erroneous on ground that it should have gone further and charged that whether or not there was surrender of possession defendants could not resist title of plaintiffs because conveyances were made to defraud creditors. 146/214, 215 (4) (91 S. E. 19).

Possession retained by vendor after absolute sale of real property is prima facie evidence of fraud, which may be explained. 147/410 (2) (94 S. E. 245).

Possession of property, real or personal, remaining with vendor after absolute deed of conveyance, is evidence

of fraud. 23 App. 634 (5) (99 S. E. 154).

Question for jury: Evidence here in claim case presented question for jury whether conveyance by defendant in *fi. fa.* through a third person to his wife was void as against creditors. 145/560 (89 S. E. 489).

Whether conveyance by husband to wife is made bona fide in payment of indebtedness, or whether it is made to delay or defraud creditors, and whether grantee takes with notice or reasonable grounds for suspicion, are questions for jury. 145/810 (1) (89 S. E. 1083).

Where issue on trial of claim case is bona fides of transfer of property by defendant in execution to claimant, and there are circumstances which, if not satisfactorily explained, may be regarded as badges of fraud, it is for jury to pass on such issues. 147/410, 411 (3) (94 S. E. 245).

Under evidence here issue of bona fides of transfer was clearly for jury, and evidence was sufficient to sustain verdict finding property subject to execution. *Id.* 410, 411 (4).

Under evidence that at time of alleged sale of property levied on to claimant by defendant in *fi. fa.* debt on which judgment was based existed and suit in which judgment was rendered was pending, that defendant continued in possession for considerable time after alleged sale, that he was then insolvent, that there were numerous judgments of record against him at time of sale, that claimant was employee of local bank of which defendant was president, it became question for jury whether sale was to defraud creditors, and, if such fraudulent purpose did exist, whether claimant had reasonable cause to suspect same. 23 App. 634 (6) (99 S. E. 154).

3.

Stated. 144/377 (3) (87 S. E. 293); 147/470 (1) (94 S. E. 568).

Charge: Where deed was made, not by defendant in partition proceedings, but by person from whom he bought, to defendant and a minor, charge that if deed be made by debtor without

adequate consideration, it may be attacked by creditor, but not by maker of deed, was error. 145/814 (2) (90 S. E. 43).

Existing creditors: Gift by debtor insolvent at time is void as to his then existing creditors, whether made to

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defraud them or not. 140/415 (2) (78 S. E. 1082).

Husband and wife: Voluntary conveyance by husband to wife, with intention to borrow money and pay off existing indebtedness, knowing that he will probably not be able to repay such money, and intending by such scheme to save the property for his wife, is fraudulent. 140/415 (3) (78 S. E. 1082).

If debtor transfers property to wife and thereafter procures loan from another to pay off existing indebtedness, representing the property to be his, and gives a security deed to the lender who is without notice of the conveyance to the wife, and the wife participates in such fraud, the deed to her will yield to that of the creditor. *Id.* 415 (4).

Though action for collection of debt due from husband to wife is barred by statute of limitations, it cannot be declared as matter of law that such debt furnishes no consideration for a conveyance of land by husband to wife. 145/810 (1) (89 S. E. 1083).

Voluntary conveyance by husband to wife is not void if husband retain ample property to pay his existing debts and liabilities; in determining whether property left or retained by husband is sufficient to pay existing debts and liabilities, property in which he is entitled to exemption or homestead, but which has not been exempted, is not to be deducted, unless jury should find as fact that

husband, at time of conveyance, intended to exempt same. 149/54 (99 S. E. 125).

Insolvency: Deed by solvent grantor who afterwards becomes insolvent is void as to creditors, if made with intent to hinder, delay or defraud them. 144/377 (3) (87 S. E. 293).

Fact of insolvency of vendor at time of sale of his property is circumstance which jury may consider on trial of issue as to whether sale was fraudulent as against his creditors. 23 App. 634 (4) (99 S. E. 154).

Intent to defraud may be inferred from circumstances. 140/415 (2-c) (78 S. E. 1082).

Record: Fact that deed is recorded does not necessarily prevent one from whom grantor procures money by representing property to be his, from having equitable remedy against grantor and grantee, if latter participates in the fraud. 140/415, 416 (4-a) (78 S. E. 1082).

Subsequent creditors: Gift by debtor insolvent at time is not void as against subsequent creditor, unless at time of making it there was an intention on part of debtor to defraud such creditor. 140/415 (2) (78 S. E. 1082).

Though money may have been obtained from subsequent creditor to pay off debts existing when gift was made, this alone would not make gift void as to such creditor, if conduct of debtor throughout entire transaction was honest, and he had no intention to defraud. *Id.* 415 (2-b).

General Note.

Cited. 142/789, 794 (83 S. E. 852).

Cancellation: Evidence here did not authorize decree of cancellation where it did not show that the plaintiff creditors would be benefited thereby. 142/422, 423 (2) (83 S. E. 99).

Creditor: Person having contract in existence at time when alleged fraudulent conveyance is made under which other party to contract might become liable to him, and who does subsequently become liable under such contract, is creditor of such person from time contract went into effect, within meaning of statute against

fraudulent conveyances. 149/763, 764 (5) (102 S. E. 146).

Parties: To suit by creditor against grantees in deed to land executed by his debtor, for cancellation of deed, and for judgment on debt, grantor (or, if dead, his legal representative) is necessary party; and where petition fails to make legal representative of deceased debtor a party, it is properly dismissed on demurrer. 147/404 (94 S. E. 235).

Repeal: Sections 3226-3229 furnish a cumulative protection to creditors.

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and do not repeal pre-existing laws against fraudulent sales. 140/10, 13 (78 S. E. 609).

Repurchase: Sale of land with right to repurchase, if in good faith, may be enforced. 140/435 (3) (79 S. E. 196).

§ 3225. (§ 2696.) **Innocent subsequent vendee.**

Laches: Plaintiff in suit to subject fund representing purchase-money due from innocent vendee to debtor's fraudulent transferee was not guilty of laches, where action was brought about five years after transactions complained of, the fraud not being discovered until month before suit. 144/377 (5) (87 S. E. 293).

Purchase money: Where fraudulent grantee sells property to innocent

purchaser, any unpaid purchase-money due him will be impounded as equitable asset of debtor for distribution to creditors. 144/377 (3) (87 S. E. 293).

Repeal: Sections 3226-3229 furnish a cumulative protection to creditors, and do not repeal pre-existing laws against fraudulent sales. 140/10, 13 (78 S. E. 609).

§ 3226. **Merchandise, how sold in bulk.**

Cited. 15 App. 561 (83 S. E. 969).

Charge that if husband made sale of stock of merchandise in bulk to his wife, the sale would be void unless "sales in bulk act" had been complied with, even if not applicable to any issue, was harmless to claimant. 13 App. 293 (3) (79 S. E. 88).

Corporation: Where, under terms of sale, it was distinctly agreed that no wood or coal was included, mere fact that pending negotiations small remnant of wood unexpectedly came into hands of vendor, and that one defendant, as an individual, bought and paid for same with his personal check, could not require finding that such purchase was fraudulent scheme or device, it further not appearing that sale of accessories was conditioned or dependent upon such separate and independent purchase of the remnant of wood. 24 App. 598, 599 (2) (101 S. E. 690).

Fl. fa.: Sale of entire stock of goods of defendant here, under levy of fl. fa., was not void under the bulk sale law. 18 App. 666 (3) (90 S. E. 360).

Fixtures: There must be intent between parties to substantially effect a sale of a stock of "goods, wares, or merchandise," and where such is not the case, mere sale of fixtures and accessories alone would not bring transaction within scope and purview of law. 24 App. 598, 599 (1) (101 S. E. 690).

§ 3227. **Duty of purchaser.**

Garnishment: Where sale of merchandise in bulk is made without compliance

Partner: Sale of interest in copartnership to two persons, whereupon one of the original partners retired, and the same business was thereafter conducted in the name of a new firm, not within this section. 140/359 (3) (78 S. E. 1078).

Statement: Where defendant in fl. fa. conveyed her stock of merchandise in bulk to her father to secure payment of certain sum that he loaned her, and she executed security deed purporting to pass title to him, transaction did not come within purview of sections 3228 and 3229, and therefore no presumption that it was fraudulent arose by reason of fact that mortgagor made no attempt to comply with provision of section 3228 as to furnishing vendee with statement under oath required by this section, and without first giving to each creditor of mortgagor notice of transaction. 18 App. 527 (89 S. E. 1051).

Strict construction: Act is in derogation of common law and of the right to alienate property without restriction, and should therefore be strictly construed. 140/359 (2) (78 S. E. 1078).

This section, being in derogation of common law, must be construed strictly. 18 App. 527 (89 S. E. 1051); 666, 667 (90 S. E. 360); 24 App. 598, 599 (1) (101 S. E. 690).

with statute, purchaser is liable in garnishment to creditor of vendor, al-

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though purchaser may have disposed of the goods prior to service on him of process of garnishment; fact that debtor was partnership, and that prior to illegal sale to garnishee one of the partners had sold out his interest to the other, would not defeat rights of creditors. 22 App. 512 (1) (96 S. E. 346).

Question as to whether or not judgment in favor of subsequent purchaser from garnishee, under claim filed under attachment levy instituted by creditor against original debtor, amounts to adjudication in favor of such garnishee that sale to him was not fraudulent, is not involved where in the garnishment proceeding no such defense is pleaded. 22 App. 512 (2) (96 S. E. 346).

No error was committed in refusing to allow garnishee to go behind judgment setting up amount due garnish-

ing creditor by principal debtor. 22 App. 512, 513 (4) (96 S. E. 346).

Notice: Sale not void, in whole or in part, by reason of fact that seller omitted name of one of his creditors and the purchaser failed to give that creditor notice of the sale, though such creditor did not in fact have any notice of the sale, and though the seller was insolvent. 140/10 (78 S. E. 610).

Purchaser of merchandise in bulk is not relieved from duty of notifying creditor of vendor of such proposed sale by reason of verbal notice given to them by vendor himself. 22 App. 512, 513 (3) (96 S. E. 346).

Strict construction: Provisions of this section, being in derogation of common law, must be strictly construed. 24 App. 598, 599 (1) (101 S. E. 690).

§ 3228. When fraud is presumed.

Notice: Sale not void, in whole or in part, by reason of fact that seller omitted name of one of his creditors and the purchaser failed to give that creditor notice of the sale, though such creditor did not in fact have any notice of the sale, and though the seller was insolvent. 140/10 (78 S. E. 610).

Statement: Where defendant in fl. fa. conveyed her stock of merchandise in bulk to her father to secure payment of certain sum that he loaned her, and she executed security deed purporting to pass title to him, transaction did

not come within purview of this section, and therefore no presumption that it was fraudulent arose by reason of fact that mortgagor made no attempt to comply with provision of this section as to furnishing vendee with statement under oath required by section 3226, and without first giving to each creditor of mortgagor notice of transaction. 18 App. 527 (89 S. E. 1051).

Strict construction: This section, being in derogation of common law, must be construed strictly. 18 App. 527 (89 S. E. 1051); 24 App. 598, 599 (1) 101 S. E. 690).

§ 3229. What sales shall be deemed fraudulent.

Security: Where defendant in fl. fa. conveyed her stock of merchandise in bulk to her father to secure payment of certain sum that he loaned her, and she executed security deed purporting to pass title to him, transaction did not come within purview of this section, and therefore no presumption that it was fraudulent arose by reason of fact that mortgagor made no attempt to comply with provision of section

3228 as to furnishing vendee with statement under oath required by section 3226, and without first giving to each creditor of mortgagor notice of transaction. 18 App. 527 (89 S. E. 1051).

Strict construction: This section being in derogation of common law, must be construed strictly. 18 App. 527 (89 S. E. 1051); 24 App. 598, 599 (1) 101 S. E. 690).

Preferences and assignments for benefit of creditors. Mortgages; general principles.

CHAPTER 3.

Preferences and Assignments for Benefit of Creditors.

§ 3230. (§ 2697.) Legal preference.

Dividends: Where creditor of insolvent bank holds collateral security for portion of debt, and receiver of bank realizes from its assets amount of cash to be applied to its debts, creditor is not entitled to dividend upon entire indebtedness due, as though he had no

collateral; such secured creditor must first apply amount realized from collateral to reduce amount of indebtedness, and is entitled, like other creditors, to dividend upon unpaid balance. 147/74 (92 S. E. 868), 274 (9) (93 S. E. 880).

CHAPTER 5.

Mortgages.

ARTICLE 1.

General Principles.

§ 3256. (§ 2723.) What is a mortgage, and what it may embrace.

Applied. 21 App. 159 (93 S. E. 1018).

Cited. 18 App. 45, 47 (88 S. E. 825).

After-acquired property: See **Future interest**.

Bankruptcy: Discharge in bankruptcy under the bankruptcy act of 1898 as amended does not affect lien of general judgment nor lien of mortgage obtained more than four months prior to filing of petition in bankruptcy, relatively to property set aside as exempt under the bankrupt's claim of homestead exemption, although holders of such liens may have proved their claims in bankruptcy. 148/380 (1) (96 S. E. 1004, 42 A. B. Rep. 328).

Where, in voluntary petition in bankruptcy, claim is made for statutory homestead exemption of money from the general estate of bankrupt, court of bankruptcy has jurisdiction to order sale of land upon which lien exists, divested of liens, and to provide that liens shall attach to proceeds of sale; where part of proceeds is set apart for bankrupt under his claim liens against which right of exemption had been waived will follow such fund. 148/380 (2) (96 S. E. 1004, 42 A. B. Rep. 328).

Construction: Question whether particular debt is secured by instrument is for court if instrument undertakes to designate debt. 17 App. 511 (2) (87 S. E. 759).

Debt: Deed or bill of sale may be made to secure present, past, or future indebtedness. 17 App. 511 (1) (87 S. E. 759).

Words of instrument here did not evince intention to secure past indebtedness of maker incurred by him by reason of his being joint maker on notes. *Id.* 511, 512 (3).

Future interest: One can not ordinarily mortgage after-acquired property. 17 App. 442 (87 S. E. 760).

General rule is that mortgage can not be made to include personal property as to which mortgagor had neither possession nor right of possession at time of making mortgage, but for which it is sought to provide by clause including any personal property which may be subsequently acquired by mortgagor. 145/831 (4) (90 S. E. 49).

The Selma, Rome & Dalton Railroad Company had lawful charter power, when it executed first mortgage on

Mortgages; general principles.

October 1, 1867, to mortgage future-acquired property, and lien of first mortgage was superior to that of second mortgage on all the property acquired by the company after date of the first mortgage, there being then in existence no constitutional inhibition of the enactment of a special law in any case for which provision had been made by an existing general law. 149/434, 435 (100 S. E. 380).

Increase of personalty: Agreement that all increase of personalty and improvements made by purchasers of land and certain personalty thereon, should become property of seller until certain notes were paid in full, constituted effort to mortgage increase of personalty. Such mortgage not valid as to personalty which might thereafter be acquired by the purchasers and moved upon the place. 140/235 (1) (78 S. E. 917).

Mortgage on domestic animals does not cover increase thereof where there is no express mention of such increase in instrument itself; such increase may be sold by mortgagor as his own and purchaser gets good title as against mortgagee. 22 App. 291 (95 S. E. 995).

Lien: Paper executed here held to create lien upon realty described, and was properly construed as being a mortgage. 147/677 (1) (95 S. E. 244).

Stock of goods: While mortgage covering stock of goods, changing in specifics, covers also additional goods purchased in the usual course of business to replenish the stock and to keep the business going, there is no such statutory provision where original stock of goods is sold under a conditional bill of sale wherein title is reserved in vendor. 21 App. 730 (1) (94 S. E. 905).

Title: Petition in action to enjoin enforcement of judgment in foreclosure, not subject to general demurrer, where it showed that deed to mortgagor was procured by fraud, and that property was mortgaged to one having full knowledge of plaintiff's rights. 143/590 (85 S. E. 758).

Where conditional vendors, upon default, took possession of mule and then sold it to vendee's father, who

paid for it and intrusted possession to his son, he had title and son could not give valid lien thereon, though son's note was transferred to father when payment was made. 14 App. 593 (81 S. E. 904).

Fact that son made false representations to mortgagee concerning his title, thereby obtaining credit and defrauding mortgagee, could not affect title of real owner, where he did not acquiesce in or authorize such representations. *Id.* 593, 595.

Chattel mortgage on property, described as not in mortgagor's possession and title to which was vested in another, was invalid. 17 App. 442 (87 S. E. 760).

Instrument in which title to personal property is retained in vendor until payment of purchase price, and which contains also stipulation that it is a mortgage on the property, should be construed as a retention-of-title contract only; vendor and vendee cannot by agreement make paper one both retaining title and not retaining title to same property. 19 App. 69 (1) (90 S. E. 1033).

Where same instrument retains title to property and also stipulates that it is a mortgage on the property, and vendor subsequently forecloses the "mortgage" and has the property sold, entire foreclosure proceedings are mere nullity, instrument not being in fact or in law a mortgage. 19 App. 69 (1-a) (90 S. E. 1033).

Foreclosure proceedings, null and void because mortgage was sought to be created by instrument retaining title to personal property, did not amount to rescission of sale on part of vendor, and did not prevent or estop him from bringing suit upon retention-of-title note to recover purchase price of property. 19 App. 69 (1-a) (90 S. E. 1033).

Lien of mortgage does not pass title or carry with it right of possession by mortgagee. 20 App. 95 (1) (92 S. E. 546).

Mortgagee can not, by attempted purchase of mortgaged property, divest intervening title of which notice is had. 20 App. 95 (1-a) (92 S. E. 546).

Mortgages; general principles.

One holding title under mortgagor can not acquire interest in property adverse to rights of mortgagee of which

he had previous notice. 20 App. 95, 96 (2) (92 S. E. 546).

See **Future interest.**

§ 3257. (§ 2724.) **Form and execution.**

Applied. 140/540, 543 (79 S. E. 144); 21 App. 159 (93 S. E. 1018).

Attestation: Stockholder of mortgagee corporation is not incompetent as nonofficial witness to signature of mortgagor. 143/11 (3) (84 S. E. 59).

Mortgage is good inter partes without any witness; purpose of witness is to admit such paper to record. 13 App. 1, 4 (78 S. E. 770).

Mortgage, attested by notary who is secretary and treasurer of corporation to which it is given, is not admissible for record. 16 App. 309 (1) (85 S. E. 267).

Not necessary that notary should attach formal certificate of acknowledgment. 224 Fed. 128 (3).

Claim of bank, which has sold mules under bill of sale, to other mules covered by mortgage as those really described in bill of sale, does not present issue of priority between junior bill of sale and senior mortgage officially attested by stockholder in mortgagee bank. 145/385 (2) (89 S. E. 365).

Where realty mortgage was signed with name and seal of mortgagor corporation, followed by signature of its president, "in presence of" two witnesses whose names were signed, without indication of official character, on left of paper and opposite other signatures, and one of such witnesses certified such president's acknowledgment of execution officially, attestation would be considered as having been signed by the official in his official capacity. 147/677 (2) (95 S. E. 244).

Stockholder or officer, though incompetent to take acknowledgment of mortgage on realty as notary, because he is stockholder or officer of mortgagee corporation, is not incompetent as non-official witness to signature of mortgage. 149/479 (1) (100 S. E. 569).

Where mortgage, attested by notary public and another witness, with proper evidence of filing for record, and without entry of satisfaction or cancellation thereon, had been introduced in evidence by mortgagee, its

effect could not be impaired by proof that record of mortgage did not show attestation by two witnesses, and contained entry tending to show cancellation; court did not err in refusing to admit in evidence certified copy of such a record. 20 App. 592 (93 S. E. 258).

Where note and mortgage given to secure it were written upon same paper and executed at same time, signatures to note that were made by witnesses who attested the mortgage will be construed only as signatures of attesting witnesses and as having no more reference to the words "Witness our hands and seals" than to any other part of the note. 21 App. 741, 742 (6-b) (95 S. E. 19).

Unattested mortgage is good as between parties thereto, or as between maker and a transferee; requirement of this section relative to attestation pertains to prerequisite necessary to its record, and has application only so far as intervening rights of third persons without notice are concerned. 22 App. 441 (1) (96 S. E. 183).

Bill of sale: Where instrument purporting to be bill of sale describes debt and contains defeasance clause it is chattel mortgage. 17 App. 666 (2) (87 S. E. 1100).

Bill of sale is distinguished from chattel mortgage in that former passes title while latter does not. *Id.*

Written instrument showing on its face that it was given as security for note described in the instrument, and containing clause, "Provided, if we shall pay said note when due, the lien thereby created to become void," is a mortgage and not a bill of sale, and did not put title to property upon claimant relying upon such instrument. 21 App. 292 (1) (94 S. E. 325).

Crops: Purchase-price note given for fertilizer, which stipulated that crops on land fertilized should be held in trust for payment of note, created mortgage on crops mentioned. 14 App. 30 (2) (79 S. E. 930).

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Date: Chattel mortgage, duly witnessed and recorded on August 7, 1912, purporting to have been signed on the — day of —, 1912, describing crops on certain lands, is sufficiently definite to constitute lien as to third parties. 17 App. 98 (1) (86 S. E. 255).

Deed is distinguished from mortgage, in that it passes title while mortgage does not. 17 App. 666 (2) (87 S. E. 1100).

Instrument the first words of which are "This mortgage, made this" stated day, and which in several other places therein is described as "this mortgage," must be construed as a mortgage and not a deed passing title. 19 App. 487 (2) (91 S. E. 786).

Where construction of contract upon which claimant based title was only question presented for determination, and trial court correctly construed instrument to be mortgage and not deed, court did not err in overruling certiorari. 19 App. 487 (3) (91 S. E. 786).

Defeasance clause: See **Bill of sale**.

Description: Mortgage on "my crops of cotton," etc., "now growing or to be grown on my farm in C. county, Ga., and all other lands cultivated by my wife," etc., "the present year and successive years," was not void for uncertainty of description. 144/564 (87 S. E. 776).

Description of property in mortgage as "all my shop tools and fixtures * * * in my possession" is not void for indefiniteness, and may be aided by parol evidence. 13 App. 1 (2) (78 S. E. 770).

Mortgage reciting that it is given to secure note for specified amount and future advances in money and plantation supplies is valid only as a mortgage to secure the note. 13 App. 632 (4) (79 S. E. 755).

Chattel mortgage on "all cotton and corn grown during current season on lands fertilized with the fertilizer," to secure payment for which mortgage was given, was not void for uncertainty. 14 App. 30 (2) (79 S. E. 930); 17 App. 834 (3) (88 S. E. 719).

Mortgage on "my crop of cotton, and corn now planted in Floyd county, Ga., 23rd district and 3rd section, consisting of 75 acres in cot-

ton and 25 acres in corn" is not void for want of sufficient description. 14 App. 99 (1) (80 S. E. 210).

Requirement that chattel mortgage specify property does not require such description as will identify property without aid of parol evidence. 16 App. 645 (1) (85 S. E. 953).

Crop mortgage, describing property as entire crop of corn and cotton on lands of named persons in given county, is sufficient. 17 App. 98, 99 (4) (86 S. E. 255).

Mortgage to secure note due, as well as any general or special balance due from mortgagor up to value of the property, which was described as being of value of \$5,000, is sufficiently definite to be valid as mortgage for future advances up to \$5,000; it appearing that mortgagee, a cotton factor, contemporaneously with execution of mortgage, took from mortgagor written obligation to ship certain cotton to mortgagee who agreed to act as mortgagor's factor. 248 Fed. 988 (2).

Mortgage which described land as having frontage of certain number of feet and extending back stated distance, and which set out boundaries on each side, and further described property as being same which was conveyed to mortgagor by deed of certain date and recorded on certain date, fully identified the land. 248 Fed. 988 (3).

Mortgage is sufficiently definite in matter of descriptive averments of land intended to be mortgage, if descriptive recitals are so definite as to render tract capable of being located. 146/685 (1) (92 S. E. 217).

Where mortgage describing land as forty acres of land lying and being in named county, known as the P. C. lot of land, and being lot number 618, was foreclosed, and execution described land in same words, but added after number of lot the words, "in the 2nd district and second section of said county and State," it was not erroneous, on trial of claim, to admit mortgage fl. fa. and entry of levy in evidence over objection that description was too indefinite. 146/685 (1-a) (92 S. E. 217).

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Where six justices are evenly divided, case being for decision by court as a whole, on controlling question whether mortgage sufficiently specifies debt to comply with this section, judgment stands affirmed by operation of law. 147/43 (92 S. E. 755).

Mortgage in which land is described as "one hundred acres of land, more or less, situated, lying, and being in the 1203d district G. M., Johnson county, Georgia, and bounded on the north by the lands of Dr. B., east by D. P., south by other lands of F. [the mortgagor], and west by lands of J. P.," the number of acres not being definite, but qualified by the term "more or less," is void for lack of sufficient description. 147/442 (94 S. E. 553).

Mortgage which describes land as "50 acres of land off of the south side of lot No. 104 in the 14th dist. of" named county, is not void for uncertainty in description of land. 148/104 (1) (95 S. E. 969).

Where number of acres is described in mortgage as "more or less," mortgage is void, such description being too vague and uncertain. 148/148, 149 (1) (95 S. E. 993).

Mortgage describing property as "5 black mare mules ranging from 6 to 9 years old and now in my possession at H., Ga., C. county, and weighing from 900 lbs. to 1150 lbs.," was too indefinite, in its description, to impart notice to third person, to whom mortgagor subsequently mortgaged one black mare mule 8 years old and one black mare mule 9 years, that these two mules were included in the former mortgage. 18 App. 575 (90 S. E. 170).

Writing which purports to create mortgage lien upon property described as "seven head of mules and horses" is void as against one claiming proceeds of sale thereof under subsequently acquired lien by attachment. 20 App. 49 (1) (92 S. E. 389).

Sufficiency of mortgage description is not governed by rule which would obtain between parties to writing, but such a degree of definiteness is required as would be sufficient to impart record notice to third parties. *Id.* 49 (2).

Mortgage describing property as one yellow mare 6 years old, about 15 hands high, immediately following

which reciting that "it is expressly agreed that said J. N. C. & Co. do not warrant health, life, soundness and work of said mule, only the title thereto," when considered as a whole, indicated existence of contract lien upon a yellow mare mule sufficiently to place all third persons upon constructive notice thereof. 20 App. 815 (93 S. E. 511).

There is no provision of law requiring that recorded purchase-money note reserving title to personal property shall state locality of machinery or upon whose land it is located, nor need it specify county of residence of maker; the law requires that the contract shall be executed and attested in the same manner as mortgages on personal property, and recorded within thirty days from its date, in the county where the vendee resides, if a resident of this State, and provides that in other respects it shall be governed by laws relating to registration of mortgages. 21 App. 16 (93 S. E. 525).

Mortgage is not void on its face for want of sufficient description of property, where property is described as "one tract of land in 401st district, G. M., of Tattall county, Georgia, said tract of land being bounded as follows: on the north, east, and south by F. M. S.; and on the west by S. and D., said tract of land containing 150 acres, more or less, and being the same tract of land purchased by mortgagors from J. W. S. and described in deed of conveyance made by said J. W. S., dated on the first day of October, 1903." 21 App. 741, 742 (7) (95 S. E. 19).

In such description, the words "bounded * * * by F. M. S.," will be construed as meaning "bounded by lands of F. M. S." *Id.* 741, 742 (7-a).

Sufficiency of description of property embraced in mortgage is question of law for the court. 23 App. 771 (1) (99 S. E. 537).

Identity of property mortgaged is question of fact for the jury. 23 App. 771 (1) (99 S. E. 537).

Evidence: Where petition distinctly alleges that described mortgage was executed by mortgagor to mortgagee, and duly recorded in office of clerk of superior court, and defendant's answer

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expressly admits execution of mortgage, and fails to deny that it was duly recorded, it is not sufficient objection to admissibility of mortgage in evidence, that it does not appear to have been executed in such manner as to authorize its admission to record, and that there is no proof of its execution. 147/787, 788 (2) (95 S. E. 689).

Identity: Mortgage note here, mortgage and note appearing on one sheet of paper, the latter being at the top, and the mortgage containing description of the note, was not invalid though signed only in the space below the mortgage portion. 145/220 (88 S. E. 819).

Intention: Whether instrument is bill of sale or chattel mortgage depends on intent of parties as evidenced by writings. 17 App. 666 (2) (87 S. E. 1100).

Party: Company which is made party to proceeding by bank in order to effectuate its foreclosure proceeding against it may raise question of validity of mortgage. 148/148, 149 (2) (95 S. E. 993).

Security: Instrument whereby title is retained to property sold, and title to other property as additional security is conveyed, is not a mortgage, but a conveyance carrying title for security

for debt. 24 App. 416 (2) (100 S. E. 779).

While, under this section, one requisite to validity of mortgage is that debt shall be therein specified, different rule obtains as to deed given to secure a debt; but where instrument in form of security deed does specify and thus limit debt in named amount as being one which it is actually intended to secure, record of instrument will not give grantee any priority over third persons who may have subsequently and in good faith acquired lien upon same property, except as to amount of particular indebtedness thus specified. 23 App. 750, 751 (2) (99 S. E. 541).

As between parties themselves rule would be different, and although deed may be given as security for named indebtedness in specified amount, it is competent for parties to extend security by agreement so that as between them it shall cover an additional indebtedness. 23 App. 750, 751 (2) (99 S. E. 541).

Assignment of bond for title as security for debt, which clearly expresses its purpose and specifies the debt and the property, is in legal effect a mortgage, and, to be effective against subsequent liens, must be recorded. 254 Fed. 278 (1); s. c. 165 C. C. A. 566.

§ 3258. (§ 2725.) Reducing deed to mortgage.

Bill of sale: If instrument in form of absolute bill of sale was in fact intended only as security for debt, it may be treated as equitable mortgage. 18 App. 307 (1) (89 S. E. 382).

Bond for title: Transfer of bond for title to land, absolute in form, may be shown to have been made for purpose of securing a loan, where the transferor retains possession of the land. 149/241, 242 (3) (99 S. E. 869).

Charge: Where, in action to establish deed as mortgage, defendant prevailed, failure to instruct on this section was harmless. 141/435, 436 (3-b) (81 S. E. 203).

Deed: While contract of sale by debtor to creditor, with right of repurchase at stipulated amount within given time, is legally possible, held

in this case that it could not be declared as matter of law that contract was of that character, so as to authorize direction of verdict. 145/835 (90 S. E. 56).

Where owner of property conveys to another against whom there is valid outstanding judgment at time, for sole purpose of putting title in grantee so that he may sell or pledge property for purpose of raising money to pay over to owner, lien of judgment will not attach and make property subject as against claim duly filed by owner of equitable interest. 148/410 (1) (96 S. E. 872).

Deed absolute on its face and accompanied by possession of property cannot be reformed by parol evidence, at instance of one of the parties, into

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a mortgage, unless fraud in its procurement is the issue to be tried. 149/548 (2) (101 S. E. 124).

Deed absolute in form may be shown to have been made to secure a debt where maker remains in possession of land conveyed; but where there is no fraud in procurement of deed, and possession is surrendered to grantee contemporaneously with execution of deed, it is not competent to show by parol that deed absolute in form was in fact a deed to secure a debt. 149/240, 241 (2) (99 S. E. 860).

Conveyance of realty in form of absolute fee-simple deed can be shown by parol evidence to be only a security deed, where grantor, after making deed, retains possession of realty conveyed. 23 App. 161 (1) (97 S. E. 864).

Petition here held to not set out cause of action for reformation of deed so as to convert it into mortgage. 149/548 (4) (101 S. E. 124).

Where petition to have warranty deed declared to be security deed did not allege that petitioner could not read, or that any fraud was practiced which excused her from reading the instrument which she signed, petition was subject to general demurrer. 149/42 (99 S. E. 115).

Possession: Parol evidence is inadmissible to convert an absolute deed into mere security deed where possession has been surrendered. 141/380 (1, 2) (81 S. E. 230).

Deed absolute in form may be shown to have been made to secure debt, where maker remains in possession of land. 141/642 (1) (81 S. E. 881).

Where grantor executes deed absolute in form, and remains in possession of

land, parol evidence is admissible to show that deed was intended as security only; such evidence is not objectionable on ground that it offends rule which makes inadmissible parol evidence to vary written terms of absolute deed. 147/161 (1) (93 S. E. 289).

Security deed: Testimony in action to recover land because deed under which defendant held was given to secure debt, that plaintiff offered to sell land to witness without any proposition to have it back was properly admitted. 143/97 (1) (84 S. E. 435).

Instrument in form of ordinary warranty deed, except that it contains provision that "This mortgage deed is the second mortgage on these lands, said grantor having heretofore given mortgages on these lands to J. and H., trustees of M. Company, and this deed is given subject to those mortgages," and which does not contain defeasance clause, will be construed not as a mortgage, but as an instrument passing title to secure debt in amount stated as consideration of deed. 23 app. 750 (1) (99 S. E. 541).

In suit for land by remote grantee in warranty deed against grantor's heirs with plea that ancestor's deed was only security for debt and prayer for cancellation and accounting, first grantee was necessary party to grant of relief so prayed, and there was no error in rejecting equitable pleas. 147/631, 632 (1) (95 S. E. 215).

Trover: Remedy provided by this section is not exclusive; owner has right also to bring trover. 18 App. 652 (2) (90 S. E. 175).

§ 3259. (§ 2726.) Registry.

Cited. 145/831 (2) (90 S. E. 49); 13 App. 420 (79 S. E. 213).

Applied. 140/540, 543 (79 S. E. 144).

Attestation: Where execution of corporation's mortgage was duly attested by official act in official capacity, such mortgage was properly admitted to record. 147/677 (2) (95 S. E. 244).

Where mortgage, attested by notary public and another witness, with proper evidence of filing for record, and without entry of satisfaction or can-

cellation thereon, had been introduced in evidence by mortgagee, its effect could not be impaired by proof that record of mortgage did not show attestation by two witnesses, and contained entry tending to show cancellation; court did not err in refusing to admit in evidence certified copy of such a record. 20 App. 592 (93 S. E. 258).

Conditional sales: In order that reservation of title to personalty be valid against third persons, where buyer is

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resident of State, it is essential that contract of sale be recorded in county where he resides when it is executed. 141/831 (1) (82 S. E. 251).

This section does not apply to conditional sale contract of goods to be shipped into the State. 231 Fed. 247 (4).

County: Recording in one county of mortgage on mule purchased in that county by resident of another county, which resident of former county also executed as additional security, was substantial compliance with this section. 214 Fed. 270.

Evidence here showed that county in which conditional sale contract was reported was county in which vendees resided. 19 App. 600 (3) (91 S. E. 920).

Filing: Where duly attested mortgage on realty has been properly filed for record, filing is notice to all persons, without regard to whether mortgage is so defectively recorded that record itself is not such notice. 20 App. 592 (93 S. E. 258).

Notice: Where, on issue as to priority of mortgages on same mule, one describing it as five years old and other as three years old, evidence of age was conflicting, court properly refused to charge that if mule was only three years old, record of former mortgage describing it as five years old, would not be evidence of its existence. 141/641 (81 S. E. 853).

Record of conditional sale contract is notice to third persons, though property is thereafter removed to another county by purchaser with seller's knowledge and consent. 144/694 (3) (87 S. E. 891).

§ 3260. (§ 2727.) **Effect of failure to record.**

Cited. 13 App. 420 (79 S. E. 213).

Applied. 224 Fed. 266 (1).

Actual notice: Burden is on holder of senior unrecorded mortgage to show clearly actual notice of mortgage to former mortgagees. 232 Fed. 100 (1); s. c. 146 C. C. A. 292.

Evidence here did not show actual knowledge by junior mortgagees of prior unrecorded mortgage, so as to give latter mortgage priority under this section. Id. 100 (2).

Record of agreement containing mortgage which is sufficient to call for further inquiry by ordinarily prudent man is constructive notice of lien on property. 17 App. 834 (1) (88 S. E. 719).

Place: Where mortgage contains no recital as to place of execution, except caption, "Georgia, Washington County," and attesting clause contains name of official witness with "Bartow, Jefferson County, Georgia," mortgage may be recorded, if otherwise entitled to record, in Jefferson County 145/531 (2) (89 S. E. 512).

Sale: Defendant bank was under no duty to transfer to plaintiff share of defendant's capital stock described in instrument executed by original owner as security for debt to plaintiff, and subsequently purchased by plaintiff at sale under that instrument, although instrument was recorded before maker became indebted to defendant bank. 22 App. 688 (97 S. E. 107).

Title: Under sections 3259, 3318, 3319, where one selling goods on credit delivers possession under duly recorded written contract reserving title until price is paid, legal title does not vest in buyer until price has been paid. 144/694 (2) (87 S. E. 891).

Unrecorded mortgage: Conveyance covering timber, logs, etc., on certain plantation, did not pass title to locomotive engine leased to the owner of the plantation, although contract between manufacturer of such engine and lessee thereof may not have been recorded as provided by law. 145/831, 832 (4-a) (90 S. E. 49).

Where purchasers of property had actual notice of mortgage thereon at time of sale, such mortgage was valid lien on the property although not recorded. 22 App. 15 (2) (95 S. E. 471).

Bankruptcy: Mortgage executed in good faith more than four months prior to mortgagor's bankruptcy, when both he and mortgagee believed him solvent, and with agreement that he should buy no more goods on credit, is not invalid as preferential, because not recorded

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until within the four months. 224 Fed. 128 (4); s. c. 35 A. B. Rep. 494. Affirmed, 245 U. S. 513 (61 L. Ed. 931, 37 Sup. Ct. 456, 40 A. B. Rep. 765).

Under this section mortgage was not transfer required to be recorded, within Bankruptcy Act. 228 Fed. 651, 652 (4); s. c. 143 C. C. A. 173; s. c. 36 A. B. Rep. 25.

Delay of recordation until four months before initiation of bankruptcy proceedings against mortgagor does not enable trustee to assail such mortgage as a preference, as of date of its recordation, under section 60b of the Bankruptcy Act, if he represents no lien other than under section 47a, arising subsequently. 245 U. S. 513 (62 L. Ed. 441, 38 Sup. Ct. 176); affirming 228 Fed. 651, 143 C. C. A. 173.

Evidence: Where plaintiff in ejectment relied on deed based on sale made at public outcry in pursuance of power in duly recorded mortgage, and defendant relied on unrecorded deed from mortgagor, junior to mortgage, but senior to plaintiff's deed, parol testimony as to transaction between defendant and mortgagor and mortgagee, whereby the land was sold by mortgagor by consent of mortgagee to defendant and purchase price paid to mortgagee, was admissible in connection with other testimony as to notice to plaintiff of the unrecorded deed. 149/660 (1) (101 S. E. 753).

Intoxicating Liquors: Where automobile was sold on credit to one who gave note for price, secured by mortgage on car, and where subsequently, before payment of note, purchaser being engaged in conveying intoxicating liquors, sheriff took him and car into custody, and instituted proceedings

under section 448 (oooo) of the Penal Code to condemn the car, equity, upon petition for injunction brought by holder of mortgage who did not participate in criminal enterprise of purchaser, should have enjoined the condemnation proceedings until provision was made for application, after final hearing, of funds arising from sale to lien of mortgage. 148/378 (96 S. E. 881).

Mistakes: Where mortgage on realty is executed in favor of named person but by mistake contains description of land different from that intended to be mortgaged, mortgage prior in date upon land intended to be covered by mortgage first referred to will, where recorded prior to date of commencement of suit to reform junior mortgage so as to make it cover land intended to be mortgaged, have priority over junior mortgage. 146/797 (92 S. E. 524).

Parties: Mortgage is good inter partes without any witness; purpose of witness is to admit such paper to record. 13 App. 1, 4 (78 S. E. 770).

Surety on renewal note was released by failure to record mortgage given to secure note, notwithstanding that note and mortgage were not given contemporaneously, where it appeared that one of the inducements held out to surety by plaintiff to sign note was that mortgage had been taken. 24 App. 116 (99 S. E. 797).

Ordinarily failure to record mortgage, given to secure payment of note, will not release surety on note unless mortgage and note were executed contemporaneously. 24 App. 116 (99 S. E. 797).

§ 3261. (§ 2728.) **How admitted in evidence.**

Record: Evidence that mortgage on personal property was filed for record and recorded in Elbert County was not sufficient to dispense with proof of

execution of mortgage, where it appeared that mortgagor resided in Wilkes County. 13 App. 338 (3) (79 S. E. 207).

§ 3262. (§ 2729.) **Defective record.**

Conditional sale: Where chattels were delivered under a conditional sale contract, and before it was recorded judgment was had against the buyer by a third person, the judgment lien

took priority over the seller's unrecorded reservation of title though the judgment was founded on a debt antecedent to the sale. 13 App. 764 (79 S. E. 952).

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County: Recording in one county of mortgage on mule purchased in that county by resident of another county, which resident of former county also executed as additional security, was substantial compliance with this section. 214 Fed. 270.

Defectively attested: Recording of mortgage, which was not properly executed, did not give constructive notice. 16 App. 309 (1) (85 S. E. 267).

Where mortgage, attested by notary public and another witness, with proper evidence of filing for record, and without entry of satisfaction or cancellation thereon, had been introduced in

evidence by mortgagee, its effect could not be impaired by proof that record of mortgage did not show attestation by two witnesses, and contained entry tending to show cancellation; court did not err in refusing to admit in evidence certified copy of such a record. 20 App. 592 (93 S. E. 258).

Priorities: Mortgage filed with clerk of superior court of county in which land lies is superior to lien of common-law execution entered on docket after such filing, though mortgage is not properly recorded. 14 App. 81 (1) (80 S. E. 343).

§ 3267. (§ 2734.) Redemption in ten years.

Second mortgage: Even if the right of redemption by a mortgagor, or his privies in estate, exists in this State, as to realty sold under foreclosure in equity to which mortgagor of his privy was not a party, second mortgagees of

the Selma, Rome & Dalton Railroad Company are barred on account of lapse of time and because of their laches from exercising such alleged right. 149/434, 435 (100 S. E. 380).

§ 3268. (§ 2735.) Debt barred, mortgage may still be foreclosed.

Cited. 143/497, 504 (85 S. E. 742).

§ 3272. (§ 2739.) Debts due by installments.

Parties: As general rule, no decree of foreclosure of common-law mortgage could be made, unless all parties entitled to mortgage money were before

the court; there can be but one foreclosure of a mortgage. 140/653, 654 (5-d) (79 S. E. 539).

§ 3274. (§ 2741.) Claiming proceeds of sales.

Stated. 22 App. 381 (1) (95 S. E. 1014).

Equity of redemption: Where before and at time of sale attorney for mortgagee gave bidders upon property, which was being sold under junior general judgment, public notice that property was being sold subject to lien of senior mortgage *fi. fa.* which he held, purchaser acquired only equity of redemption held by defendant in junior *fi. fa.*, and upon trial of claim interposed by purchaser of property, it was not error for trial judge, who tried case without jury, to render judgment finding property subject to mortgage *fi. fa.* 22 App. 381 (2) (95 S. E. 1014).

Option: When property on which there is a mortgage which has been foreclosed is levied on under other process, holder of mortgage has option to place his mortgage *fi. fa.* in hands of officer, cause title unincumbered to be sold, and claim proceeds, according to date of his lien. 18 App. 514 (1) (89 S. E. 1102).

Title: One claiming funds by intervention in ruling to distribute money derived from sale under execution can not support claim by showing title vested in some person other than defendant in execution. 17 App. 804 (2) (88 S. E. 691).

Mortgages on real estate; application to foreclose; when, where, and how made, etc.

ARTICLE 2.

Mortgages on Real Estate, How Foreclosed.

SECTION 1.

Application to Foreclose; When, Where, and How Made, and Proceedings Thereon.

§ 3276. (§ 2743.) **Foreclosure of mortgage on realty.** Mortgages on real estate in Georgia may be foreclosed in the following manner, to wit: Any person applying and entitled to foreclose such mortgage shall, by himself or his attorney, petition to the superior court of the county wherein the mortgaged property may be, which petition shall contain a statement of the case, the amount of the petitioner's demand, and a description of the property mortgaged; whereupon the court shall grant a rule directing the principal, interest, and costs to be paid into court on or before the first day of the next term immediately succeeding the one at which such rule is granted; which rule shall be published [twice a month for two months,] (a) or served on the mortgagor or his special agent or attorney, at least [thirty days] (a) previous to the time at which the money is directed to be paid into the court, as aforesaid: Provided, that where the land covered by the mortgage consists of a single tract of land divided by a county line or county lines, such mortgage may be foreclosed on the entire tract in either of the counties in which part of it lies: Provided further, if the mortgagor resides upon the land, the mortgage shall be foreclosed in the county of his residence.

Act 1879, Cobb, 570. Act 1829, Cobb, 572. Act 1836, Cobb, 572. Acts 1878-9, p. 50. (a) Acts 1920, p. 78.

§§ 2882, 5555.

Applied. 141/214 (80 S. E. 713).

Evidence: Mortgage should be received in evidence without proof of indorsement of note and mortgage, on foreclosure by original mortgagee to use of transferee. 144/241 (86 S. E. 1094).

Life estate: Where interest of mortgagor acquired under will of her deceased husband terminated at her death, there was no error in directing verdict for defendant in suit to foreclose the mortgage. 147/472 (3) (94 S. E. 563).

Limitations: Where mortgage was given in 1875 on homestead, and foreclosure proceedings were commenced in 1876, and dismissed because the homestead was not subject, foreclosure proceedings commenced in 1910, two years after termination of the homestead, not barred by limitations. 140/699, 700 (3) (79 S. E. 561).

Petition: Mortgage note stating that it is second mortgage on property, the first being given to a certain society, petition in foreclosure alleging that there is no such society, is demurrable. 140/603 (2) (79 S. E. 540).

Rule: Evidence in claim case pending *fi. fa.* on mortgage held to show that rule nisi and rule absolute were granted in mortgage foreclosure. 144/100 (2) (86 S. E. 241).

Only "process" that is necessary in proceeding to foreclose mortgage on realty is the rule nisi. 21 App. 741 (2) (95 S. E. 19).

Only prayer for process that is necessary in proceeding to foreclose mortgage on realty is prayer for rule nisi. 21 App. 741 (2) (95 S. E. 19).

Foreclosure of mortgages on realty; of pleas, defenses, etc.

Service: Where rule nisi upon petition to foreclose mortgage was issued at general term of superior court, more than three months before next term, and at latter term mortgagor was required to pay money into court, and personal service was effected prior to latter term, but too late to be due service to that term, it became returnable to next succeeding term. 145/338 (89 S. E. 195).

Where service of rule nisi to foreclose mortgage on realty was acknowledged by mortgagors four days before rule absolute was granted, and judgment absolute recited that mortgagors named had acknowledged service on rule nisi, such defective service did not render judgment absolute void, but voidable. 146/253 (1) (91 S. E. 62).

Service of rule nisi, made by special bailiff appointed by judge of superior court under section 6310, is not legal, although service was made during term of court at and for which bailiff was appointed; rule nisi must be served by sheriff or his deputy. 149/647, 648 (2-a) (101 S. E. 536).

If bailiff had made service at special direction of sheriff of county, and had made his return of service as deputy sheriff, different question would be presented. *Id.* 647, 648 (2-b).

Leaving copy of rule nisi at defendant's residence will not suffice; there must be either personal service or service by publication. 149/647, 648 (2) (101 S. E. 536).

Where quarterly terms of superior court in particular county are provided for by law, and rule nisi on petition to foreclose mortgage on realty is granted at one term, and first day of next regular succeeding term will occur within less than three months after grant of rule nisi, it should be made returnable to first term thereafter for which lawful service can be had, or next term but one. 19 App. 376 (2) (91 S. E. 573).

Where rule nisi on petition to foreclose mortgage on realty in superior court directed that money due on mortgage be paid into court on or before first day of term next immediately succeeding term at which it was granted, and rule was served on defendant at least three months before term designated for payment, issue made by defense filed at that term was triable at that term. 20 App. 147 (92 S. E. 764).

Where plaintiff seeks judgment in rem, and not a judgment in personam, service by publication, in accordance with statute, is no less effective than personal service. 21 App. 741 (3) (95 S. E. 19).

Waiver by defendant of statutory requirements and consent that rules nisi and absolute may be issued and mortgage foreclosed at first term, does not bind third persons, nor confer such jurisdiction as will authorize court to render final judgment of foreclosure at first term. 143/543 (85 S. E. 696).

§ 3278. (§ 2745.) Transferee may foreclose, how.

Assignment in writing: Where mortgagee's administrator delivered mortgage to plaintiff as part of his interest in estate, and the only other party having an interest relinquished to him, plaintiff had a perfect equitable title

to the mortgage, entitling him to enforce the same, though the administrator did not assign it to him in writing. 140/699, 700 (5) (79 S. E. 561).

SECTION 2.

Of Pleas, Defenses, etc., When and How Made.

§ 3279. (§ 2746.) Defense against foreclosure of mortgage on realty.

Damages: A mortgagor may plead damages arising from the breach of an independent contract, as a set-off

in bar of a proceeding to foreclose a mortgage on land. 141/214 (80 S. E. 713).

Of the judgment and disposition of mortgaged property; proceeds of sale of same, how appropriated.

§ 3280. (§ 2747.) Third person can not defend.

Junior vendee: Foreclosure by statutory method, to which proceeding junior vendee of land is not party, while not conclusive on such vendee is valid as between holder of mortgage and mortgagor, and purchaser at foreclosure sale acquires legal estate of

mortgagor; and where no illegality in the foreclosure proceeding and the sheriff's sale thereunder is made to appear, sheriff's deed is superior to deed executed by mortgagor after date of mortgage. 146/490, 491 (6) (91 S. E. 675).

§ 3281. (§ 2748.) Proceedings to foreclose when mortgagor dead.

Applied. 144/517 (87 S. E. 655).

§ 3282. (§ 2749.) Issue, how tried.

Term of court: Where rule nisi on petition to foreclose mortgage on realty in superior court directed that money due on mortgage be paid into court on or before first day of term next immediately succeeding term at which it

was granted, and rule was served on defendant at least three months before term designated for payment, issue made by defense filed at that term was triable at that term. 20 App. 147 (92 S. E. 764).

SECTION 3.

Of the Judgment and Disposition of Mortgaged Property.

§ 3283. (§ 2750.) Judgment, and sale of mortgaged property.

Affidavit of illegality: Where creditor of mortgagor, whether his debt be in judgment or not, desires to contest validity or fairness of mortgage lien claimed by another creditor, adequate remedy is afforded by affidavit of illegality under section 3304. 147/307 (1) (93 S. E. 894).

Execution: Where in claim case it appeared that of property levied on, parts, admittedly belonging to claimant, were not included in mortgage on which judgment had been obtained, verdict finding such parts subject to *f. fa.* was unauthorized. 15 App. 190, 191 (3) (82 S. E. 770).

Judgment: Where mortgage *f. fa.* was

valid on its face burden was on claimant attacking same to show invalidity of foreclosure. 144/100 (1) (86 S. E. 241).

Power of sale in mortgage was not extinguished by general judgment obtained by holders against maker of note in suit in city court. 146/347, 348 (3) (91 S. E. 119).

Waiver by defendant of statutory requirements and consent that rules nisi and absolute may be issued and mortgage foreclosed at first term, does not bind third persons, nor confer such jurisdiction as will authorize court to render final judgment of foreclosure at first term. 143/543 (85 S. E. 696).

SECTION 4.

Proceeds of Sale of Mortgaged Property, How Appropriated.

§ 3284. (§ 2751.) Disposition of proceeds.

Holder of bonds: Creditor with whom bonds had been deposited as collateral, who bought bonds under circumstances rendering sale void, was entitled on

foreclosure of mortgage securing bonds, to recover amount actually loaned by him and interest thereon. 144/761 (2) (87 S. E. 1083).

Foreclosure of mortgages on personalty and bills of sale to secure debt.

Judgment: Where owner of mortgage did not foreclose but obtained general judgment, and property embraced in mortgage was sold by sheriff, fund was properly awarded, on rule against sheriff, to judgment younger than mortgage but older than such general judgment, though such younger judgment was based on mortgage older than the general judgment. 19 App. 703 (2) (91 S. E. 1062).

Priorities: Where A sold property to B, giving bond for title, and B created

mortgage lien in favor of C, after which A conveyed property to B so that B might pass title to D, who made loan thereon with which to pay purchase money, but, under agreement between A and B, latter retained part of loan, executing at same time deed to A to secure payment to him of part of money loaned by D which B retained, C's mortgage lien attached as against A, and A's lien was inferior to lien of D. 147/677 (3) (95 S. E. 244).

§ 3285. (§ 2752.) **When proceeds may be retained by the court.**

Cited. 140/653, 655 (79 S. E. 539).

ARTICLE 3.

Of Mortgages on Personal Property, and Bills of Sale to Secure Debts, How Foreclosed.

SECTION 1.

Application to Foreclose, by Whom and How Made.

§ 3286. (§ 2753.) **Mortgages on personalty, how foreclosed.**

Affidavit: Copy of chattel mortgage was not sufficiently verified where certificate recited merely, "I hereby certify on oath that the above is a true copy of the original mortgage which is now in my possession," it not showing that any oath was administered. 14 App. 30 (1) (79 S. E. 930).

Copy of mortgage, attached to foreclosure affidavit, was verified by statement in affidavit. 18 App. 423 (1-b) (89 S. E. 540).

Bail-trover: Where contract of conditional sale, in which title to property sold was reserved in vendor until payment of purchase money, was embraced in same instrument with mortgage on other property to secure payment of debt, institution of bail-trover proceeding by vendor to recover property included in the conditional sale did not preclude him from foreclosing the mortgage. 18 App. 578 (1) (90 S. E. 101).

Burden of proof was on plaintiff in action to foreclose chattel mortgage on crops upon which fertilizer bought

should be used to show that fertilizer was used on crops claimed to be subject to the mortgage, and in absence of such evidence direction of verdict for plaintiff was error. 14 App. 30 (3) (79 S. E. 930).

Conditional sale: Purchase-money note for amount exceeding \$100, containing merely reservation of title to personalty sold, can not be foreclosed as mortgage. 17 App. 645 (2) (88 S. E. 36).

Execution: Assignee of chattel mortgage is estopped to claim that he was third party who could take advantage of mortgagor's dismissal of levy of mortgage *fi. fa.* 17 App. 98 (2) (86 S. E. 255).

Petition for foreclosure of mortgage setting forth mortgage which recited that it was given to secure a note, such note not being attached to the petition and amount of debt and rate of interest not appearing, was subject to general demurrer. 145/776 (89 S. E. 829).

Foreclosure of mortgages on personalty and bills of sale to secure debt.

Sheriff: Omissions or irregularities of sheriff at sale by him are not chargeable to buyer, but are questions between sheriff and parties to judgment. 16 App. 550 (1) (85 S. E. 823).

Substantial compliance: If requirements for foreclosure of chattel mortgage have been substantially complied with, and all defects in proceedings appear to be amendable, proceeding is not void, and third persons acquiring rights

to property sold thereunder will be protected. 18 App. 423, 424 (1-d) (89 S. E. 540).

Waiver: Foreclosure of mortgage upon personal property is such disaffirmance of title by mortgagee as waives assertion of title, though mortgage may be only part of contract containing reservation of title. 17 App. 645 (1) (88 S. E. 36).

§ 3287. (§ 2754.) Foreclosure before debt due.

Affidavit for foreclosure before maturity, which alleged that "defendants" were about to remove mortgaged property from county, but did not show that defendants were purchasers of it, was insufficient. 15 App. 359 (1) (83 S. E. 273).

Affidavit to foreclose a mortgage, stating that mortgagor has placed himself in some one of the positions where process of attachment could legally issue against him, is amendable. 18 App. 423 (1-a) (89 S. E. 540).

Affidavit alleging that defendant "resides out of the State" alleges a ground of attachment, and hence authorizes foreclosure of mortgage before due, and if further allegation that mortgagor has placed himself in posi-

tion where process of attachment could legally issue against him is a necessary averment, it may be added by amendment. 18 App. 423 (1-a) (89 S. E. 540).

Requirement that affidavit shall state when amount of debt or demand "will be due," was sufficiently met by assertion in affidavit "that there is now due on said mortgage the sum of \$500 principal and \$15 interest, and that the amount of said several sums is now due." 18 App. 423, 424 (1-c) (89 S. E. 540).

Bond: Section 3304 is applicable only where another seeks to interpose illegality or mortgagor is liable to attachment under this section. 17 App. 376 (1) (86 S. E. 1073).

§ 3290. (§ 2757.) Levy and sale of property.

Advertisement: This section should be construed with sections 6062 and 6067; construing these sections together, it would seem that it is not sufficient to advertise mortgaged property in any public gazette of the State, but that it must be advertised in newspaper published at county site of county, if there be such, and if there be no such paper published in the county, then in the nearest newspaper having the largest or a general circulation in such county. 21 App. 287, 290 (94 S. E. 318).

Custody: Where, after levy of *fi. fa.*, defendant executed paper conveying chattels mortgaged to plaintiff, agreeing to deliver them on default in payment of debt secured and stipulating that levy should not be dismissed, right to custody was in officer mak-

ing levy, and plaintiff in *fi. fa.* could not bring trover. 143/563 (1) (85 S. E. 860).

Where mortgage *fi. fa.* in favor of guano company and distress warrant in favor of another plaintiff were levied upon cotton found in warehouse of gin company, and levy of distress warrant was met by claim filed by person who gave claim bond and forthcoming bond, which levying officer accepted, and levy of mortgage *fi. fa.* was not arrested by any proceeding and cotton levied on was sold, but sheriff was unable to deliver same for reason that it had been removed from warehouse without authority from the guano company, plaintiff in mortgage *fi. fa.* or levying officer, court did not err in directing verdict for the gin company. 21 App. 585 (94 S. E. 814).

Foreclosure of mortgages on personalty; defenses.

§ 3296. (§ 2763.) **Mortgagor to have notice.**

Execution: This section does not require that execution shall recite that notice has been given to the mortgagor of proceedings at time of execution. 18 App. 705 (2) (90 S. E. 373).

Plea: Where mortgage on personal property is foreclosed in justice's court and affidavit of illegality interposed by defendant, and record does not show that failure of justice of the peace to give notice to mortgagor was urged or suggested as ground of defense, or by way of abatement, and it appears that case was appealed by consent to superior court, and thereafter "special plea in bar" was filed in superior court, which raised for first time issue that foreclosure was invalid because of failure to give such notice, and court upon motion struck the plea, there is no merit in exceptions pendente lite, complaining of his ac-

tion in so doing and of his refusal to dismiss levy. 18 App. 705 (3) (90 S. E. 373).

There being no plea raising the issue as to giving of notice, after court had dismissed plea in abatement because not filed at time fixed by law, court did not err in declining to admit testimony tending to prove that no notice had been given mortgagor by justice of the peace at time execution was issued thereon. 18 App. 705, 706 (4) (90 S. E. 373).

Waiver: Where there was no motion to dismiss levy on ground that notice prescribed by this section had not been given, and defendant in *fi. fa.*, although reciting such failure, entered plea to merits without actual protestation, failure to give notice referred to must be taken as waived. 22 App. 441 (2) (96 S. E. 183).

§ 3298. **Bill of sale to secure debt, foreclosure of.** The owner of any bill of sale [or written contract retaining title] (a) to personal property to secure a debt, [or written contract where title is retained to personal property to secure a debt,] (a) may foreclose the same in the same manner as mortgages on personal property are now foreclosed, under the laws of this State.

Acts 1899, p. 82. (a) Acts 1921, p. 114.

§§ 3293, 3306, 6037.

Amount: Where there is variance between amount stated in bill of sale and that stated in affidavit of foreclosure, foreclosure is not void for that reason; if amount claimed in

affidavit be too large, defendant or an opposing creditor can contest amount and have it reduced. 22 App. 56 (1) (95 S. E. 316).

§ 3299. **After proceedings.**

Amount: Where there is variance between amount stated in bill of sale and that stated in affidavit of foreclosure, foreclosure is not void for that reason;

if amount claimed in affidavit be too large, defendant or an opposing creditor can contest amount and have it reduced. 22 App. 56 (1) (95 S. E. 316).

SECTION 2.

Of the Defenses, When and How Made.§ 3300. (§ 2765.) **Affidavit of illegality to mortgage *fi. fa.***

Bond: In proceeding to foreclosure mortgage on personalty, fact that dismissal of counter-affidavit was caused by

plaintiff, on ground that bond given by defendant and surety did not meet statutory requirements, does not pre-

Foreclosure of mortgages on personalty; defenses.

clude plaintiff from maintaining action on bond as common law contract, where defendant has obtained substantial benefit under bond by receiving and withholding property involved. 20 App. 267 (92 S. E. 1023).

Claim: Claimant of mortgaged property levied on was not entitled to amend claim to allege that mortgagor was not indebted to mortgagee. 16 App. 382 (2) (85 S. E. 354).

Final process: Unless execution issued on foreclosure is arrested by counter-affidavit, it is final process. 16 App. 382 (1) (85 S. E. 354).

Insufficiency: Allegations of affidavit as to whether no order for sale was granted, or whether one was granted which was averred to be illegal, and as to any illegality in manner of conducting sale, held here to be insufficient to make issue requiring submission to jury. 140/740 (2-b) (79 S. E. 783).

Set-off: In proceeding to foreclose chattel mortgage, mortgagor may by affidavit of illegality avail himself of any defense which he might set up in ordinary suit upon demand secured by

the mortgage, and which goes to show that amount claimed is not due and owing; while mortgagor is thus permitted to avail himself of valid defense by way of recoupment, he is not entitled to plead defense of set-off in such a summary proceeding, since latter defense is not one which goes to justice of plaintiff's demand. 22 App. 441 (3) (96 S. E. 183).

Truth: Where property is sold under mortgage foreclosure, defendant therein cannot in trover suit recover it from third person who purchased it in good faith at that sale, by showing that some of the averments in the affidavit of foreclosure were untrue. 18 App. 423, 424 (2) (89 S. E. 540).

Warranty: Where there was no allegation as to breach of warranty within period alleged to have been covered by warranty, and it did not appear that warranty was part of consideration of purchase, court did not err in striking affidavit of illegality, by which it was sought to set up breach of warranty as defense to foreclosure of purchase-money mortgage on personal property. 22 App. 328 (95 S. E. 1022).

§ 3301. (§ 2766.) Replevy bond.

Bond: Where affidavit of illegality is filed, bond given by defendant in execution must be payable to plaintiff and be conditioned for return of property when called for by levying officer. 14 App. 180 (1) (80 S. E. 663).

Such bond, payable to levying officer and conditioned for delivery of property at sale, is not good statutory bond, but is good common-law obligation and may be enforced by obligee for plaintiff in execution. Id. 180 (2, 3).

Principal and sureties were estopped from attacking validity of execution. Id. 180 (4).

Fact that property described in bond has been taken from principal obligor under superior legal process is defense on bond, but fact that principal obligor has surrendered property under process inferior to lien of mortgage is no defense. Id. 180 (6).

Where personalty was levied on under mortgage *fi. fa.* more than four

months prior to adjudication of defendant in execution as bankrupt, and forthcoming bond given, seizure by bankruptcy court of property levied on will not release surety on forthcoming bond. Id. 180, 181 (7).

Dismissal of affidavit of illegality for want of prosecution will not estop principal or surety on bond from showing as defense that mortgagor made payments which mortgagee failed to credit on execution or from showing accord and satisfaction of debt. Id. 180, 181 (8, 9).

That forthcoming bond is not payable to plaintiff, as provided by this section, does not preclude recovery on bond. 16 App. 298 (3) (85 S. E. 203).

Breach: Plea in action for breach of forthcoming bond given for live stock, alleging that stock died in possession of makers of bond, that it was due solely to act of God, stating cause of death, stated valid defense. 15 App. 95 (2) (82 S. E. 669).

Foreclosure of mortgages on personalty; defenses.

Conditions: On interposing affidavit of illegality mortgagor should execute replevin bond, which need not comply with section 3304. 17 App. 376 (1) (86 S. E. 1073).

Demand by sheriff on either principal or surety on bond is not essential, in order to establish breach of bond. 15 App. 95 (3) (82 S. E. 669).

Notice: Legal advertisement of property described in forthcoming bond is sufficient notice of breach, and proof of advertisement will suffice to show breach if property be not pro-

duced at time and place of sale. 15 App. 95 (3) (82 S. E. 669).

Where it is pleaded or proved by plaintiff, or formally admitted by defendant, that it is impossible to produce property at sale, that might dispense with advertisement, so far as parties to suit are concerned. Id. 95 (4).

Sale: Where on foreclosure defendant interposed affidavit of illegality, but fails to replevin the property, it may be sold by special order of the court. 140/740 (2) (79 S. E. 783).

§ 3302. (§ 2767.) Sale of mortgaged property and disposition of proceeds.

Conditional sale: Where conditional sale contract was recorded, and sellers recovered judgment and levied execution, and buyer thereafter mortgaged property to bank, which foreclosed and levied execution and caused property to be sold at sheriff's sale, conditional sellers were entitled to fund. 144/857 (88 S. E. 190).

Fraud: Where distress warrant and landlord's lien for supplies are levied on crops, mortgagee thereof may summarily foreclose and place mortgage *fi. fa.* with levying officer, and in rule to distribute proceeds of sale may attack contesting liens as fraudulent. 144/353 (1) (87 S. E. 274).

Garnishment: Where chattel mortgage securing note payable to bearer was foreclosed by one as holder, and mortgaged property was sold, and subse-

quently junior judgment creditor of mortgagor served garnishment on levying officer, who answered that he had funds of mortgagor, but failed to set out that they arose from such sale, and suffered judgment to be rendered against him, he could not then contest right of holder to enforce lien. 141/674 (1) (81 S. E. 1107).

Officer could not have amount of judgment against him deducted from proceeds of sale, as against plaintiff in mortgage *fi. fa.* Id. 674, 675 (2).

Petition here did not allege sufficient facts to justify equitable intervention against wife's processes to collect amount claimed from her husband as due for rent and supplies. 144/353, 355 (87 S. E. 274).

§ 3303. (§ 2768.) Representative of deceased mortgagee may foreclose.

Receiver: Where land conveyed by security deed was sold under judgment in favor of holder of security, and, on rule to distribute proceeds after payment of judgment, fund was claimed by receiver of bank, to which, after execution of such deed, defendant sold his interest, and such claim

was contested and fund claimed by holder of general judgment against grantor, rendered after execution of latter conveyance, court did not err in holding that such receiver was entitled to the fund. 19 App. 193 (91 S. E. 232).

§ 3304. (§ 2769.) How third person may contest mortgage lien.

Applicability: This section is applicable only where another seeks to interpose illegality or mortgagor is liable to attachment under section 3287. 17 App. 376 (1) (86 S. E. 1073).

Where creditor of mortgagor, whether debt be in judgment or not, desires to contest validity or fairness of mortgage lien claimed by another creditor, adequate remedy is afforded

Foreclosure in equity.

by affidavit of illegality under this section; provisions of this section apply as well to mortgages upon real property as to mortgages upon personal property. 147/307 (1) (93 S. E. 894).

Bankruptcy: Under this section and section 3428, trustee in bankruptcy can set up usury in mortgage executed by bankrupt, though reduced to judgment. 228 Fed. 551 (2); s. c. 35 A. B. Rep. 841.

Priority: In absence of agreement or special equity to contrary, assignees holding separately several notes secured by mortgage or otherwise are entitled to share pro rata, and without any preference, in proceeds arising from sale of security, when insufficient to satisfy them all; this is true although notes matured on different dates and the assignments were made at different times. 19 App. 219 (91 S. E. 267).

ARTICLE 4.

Foreclosure in Equity.

§ 3305. (§ 2770.) Foreclosure in equity.

Cited. 143/543, 546 (85 S. E. 696).

Common-law remedy complete, equity will interfere. See § 4538 and notes.

Personal judgment: While, so far as a judgment of foreclosure may purport to be a general personal judgment, it is dormant because of failure to issue execution in terms of statute relating to dormancy, it is valid and enforceable as a decree foreclosing mortgage. 140/249 (1) (78 S. E. 848).

Where suit was brought to declare a deed void and cancelled, to have

mortgage decreed superior lien and foreclosed, and for judgment against the mortgagor, and demurrer challenging validity of mortgage was good, such action was maintainable for sole purpose of reducing plaintiff's claim to judgment against codefendant. 148/148, 149 (3) (95 S. E. 993).

Petition here did not allege sufficient facts to justify equitable foreclosure of chattel mortgage. 144/353, 354 (2) (87 S. E. 274).

General Note on Mortgages.

Destruction: Second crop mortgagee, who receives crops in satisfaction of mortgage, with knowledge of prior lien, having placed property out of reach of execution, is liable to first mortgagee for value of property. 17 App. 98, 99 (5) (86 S. E. 255).

Purchase money mortgage: Where personality is sold on credit, and contemporaneously therewith purchaser gives to seller mortgage on property to secure indebtedness, lien of purchase money mortgage is superior to all common law, judgments rendered against mortgagor prior to purchase and giving of purchase money mortgage. 18 App. 140 (1) (88 S. E. 906).

Where holder of note for purchase money of personality, secured by duly recorded mortgage thereon, retakes

possession, by agreement with purchaser, at agreed valuation to be applied on debt, no part of which has been paid, and cancels note and sells property to another, latter may successfully maintain claim of title as against junior mortgage made by original purchaser, unexpired at time property was returned to original seller, if value of property at time of return did not exceed amount due on debt and transaction was free from fraud. 18 App. 356 (89 S. E. 528).

Receiver: Owner of property here not estopped to reclaim it from possession of receiver appointed in mortgage foreclosure proceedings by means of intervention. 140/235 (2) (78 S. E. 917).

Sales to secure debts.

CHAPTER 6.

Sales to Secure Debts.

§ 3306. (§ 2771.) **Absolute deeds and not mortgages.**

Cited and applied. 145/452, 455 (89 S. E. 411).

Bankruptcy: Where borrower of money executed deed to secure debt and received bond for title, and suit was instituted to subject property to payment of debt, and within four months next after judgment, but more than four months after debt and record of security deed, debtor was adjudged bankrupt, judgment is not invalid on account of section 67 (f) of the bankruptcy act. 145/580 (1) (89 S. E. 740).

Where general judgment is obtained in suit upon notes secured by deed, and within four months next after rendition thereof, but more than four months after date and record of security deed, debtor is adjudged bankrupt, the judgment is not, on account of § 67 (f) of the Bankruptcy Act, invalid and effective for purpose of bringing property to sale to pay the debt and to subject property in accordance with special lien. 146/396 (2) (91 S. E. 409, 38 A. B. Rep. 821).

Bill of sale: Paper stipulating that maker conveys certain personalty to secure a debt, and that upon payment of such debt the creditor will reconvey to the debtor, is a bill of sale to secure a debt, and not a mortgage. 13 App. 419 (1) (79 S. E. 225).

If instrument in form of absolute bill of sale was in fact intended only as security for debt, it may be treated as equitable mortgage. 18 App. 307 (1) (89 S. E. 382).

Bill of sale of personalty to secure a debt, although containing clause to reconvey property upon payment of debt, is not a mortgage, but is an absolute conveyance of the property, and passes title until debt is fully paid. 18 App. 652 (1) (90 S. E. 175).

See § 3257, catchword **Bill of sale.**

Bond: Security deed passes title until debt is paid, though bond for reconveyance is given by grantee. 142/538 (83 S. E. 133).

Ejectment: Deed given to secure debt passes legal title and authorizes recovery in ejectment. 143/526 (3) (85 S. E. 691).

Grantee in security deed can bring ejectment against grantor to recover possession, subject to application of the rents and profits to payment of debt secured. 145/17 (1) (88 S. E. 562).

In order that grantee in security deed might maintain ejectment, not essential that he tender to defendant amounts already received as part payment of purchase money. 145/17 (2) (88 S. E. 562).

Evidence in action by grantee for recovery of land that debt had been created but that defendant had failed to give notes, admissible, though deed recited giving of notes. 140/46 (2) (78 S. E. 412).

Defendant admitted possession by defending the action, and evidence thereof was not required. *Id.* 46 (3).

Heirs: Where legal title to land has been conveyed to secure repayment of debt, and is outstanding, and the debt is unpaid at time of grantor's death, such title does not descend directly to his heirs at law. 149/825 (7) (102 S. E. 526).

Improvements: Where subsequent grantees bought equity entitling them only to pay up indebtedness secured by deed and take the property, or to surplus of cash, if any, after sale of property and payment of debts, court did not err in striking from agreed statement of facts evidence in regard to placing of permanent improvements on land by such grantees, the record of the security deed being constructive notice to them and actual notice not being necessary. 146/741, 742 (2) (92 S. E. 214).

Injunction: Granting of interlocutory injunction for protection of holder of note was not error here in action on note secured by deed to land which maker had transferred to third person. 145/490, 491 (2) (89 S. E. 519).

Sales to secure debts.

Insurance: Where defendant admitted plaintiff's allegation of breach of condition of security deed requiring that he insure property, and offered insufficient plea in avoidance thereof, no issue was raised. 16 App. 7, 8 (3) (84 S. E. 222).

Lender's acceptance of past-due interest did not constitute waiver of right to declare default and enforce payment because of borrower's failure to keep property insured. *Id.* 7, 8 (4).

Lien: Where a debtor conveyed to his creditor land as security, and later gave bond for title to another, receiving notes, which he deposited as additional security, and depositing deeds to his purchaser in escrow, such purchaser was a proper, though not necessary, party to a suit by the creditor against the debtor for personal judgment and to have lien enforced against the land and the proposed purchaser's notes. 141/493 (1) (81 S. E. 223).

Where payee in note secured by deed assigns the note without recourse, at same time conveying title to the land, land is not discharged from the obligation. 145/490 (1) (89 S. E. 519).

Where individual executed to bank note and to secure payment executed absolute deed of conveyance, and subsequently, in note given in renewal of former note, it was stipulated that any excess of security should be applicable to any other note or claim held by the bank, and where prior to execution of renewal note, and while original note and the deed were in hands of bank, maker executed and delivered another note to same bank, latter would have, as against maker, lien upon property conveyed in security deed. 149/650 (1) (101 S. E. 769).

In suit upon promissory notes prayer for establishment of special lien upon real estate, conveyed as security for payment of debt evidenced by the notes, does not render proceeding a case respecting title to land, and in such suit the city court of Thomasville has jurisdiction to declare special lien on realty. 18 App. 45 (1) (88 S. E. 825).

Where corporation sued for amount of alleged indebtedness and prayed that judgment be declared special lien on land alleged to have been conveyed by defendant to certain officer of plaintiff corporation, as security for the debt, and evidence showed that conveyance was ordinary warranty deed to such officer individually, court erred in charging that if jury should find that such deed was made to such officer, for the use and benefit of the plaintiff to secure the indebtedness, they would further find that plaintiff have special lien upon land to secure the indebtedness. 21 App. 567 (94 S. E. 838).

Mortgage: Instrument in usual form of security deed under this section, but containing clause providing that should grantor "faithfully perform and keep all the covenants and agreements herein set forth, this conveyance shall cease, determine, and be void," is a mortgage, and not a deed. 19 App. 487 (1) (91 S. E. 786).

Instrument in form of ordinary warranty deed, except that it contains provision that "This mortgage deed is the second mortgage on these lands, said grantor having heretofore given mortgages on these lands to J. and H., trustees of M. Company, and this deed is given subject to those mortgages," and which does not contain defeasance clause, will be construed not as a mortgage, but as an instrument passing title to secure debt in amount stated as consideration of deed. 23 App. 750 (1) (99 S. E. 541).

Note: Transfer of negotiable promissory note secured by deed, although transfer be made by indorsement of payee on note without recourse upon him, will not discharge land from incumbrance placed upon it by the deed. 148/275, 276 (3) (96 S. E. 566).

Provision in note held by bank, which was secured by deed to bank, that "any excess of security upon this note shall be applicable to any other note or claim held by said bank against me," was not, without more, sufficient to show that parties intended that deed should secure also payment of note held by bank made by same person before execution of first-mentioned note. 23 App. 356 (2) (98 S. E. 418).

Sales to secure debts.

Notice: Where owner of land executed security deed and later sold the land, and holder of security deed surrendered it and received new one from the purchaser, he took with notice of the rights of holders of bond for title. 145/890, 891 (3) (90 S. E. 41).

Where A loaned B money, and to secure payment B executed warranty deed to A, and took from A bond for title conditioned to recover to grantor, or his assigns, upon payment of sum specified, and thereafter B borrowed additional sum, giving promissory note, which expressly authorized A to retain any deposit, etc., in possession of A during time note remained unpaid, and to apply same to any debt or liability to A, transferee of bond for title, without notice of last or additional loan, could enforce bond according to terms thereof, and grantee could not resist demand on ground that he was entitled, before performance, to repayment of second loan. 149/663 (101 S. E. 796).

One entering into possession of land under deed from pretended purchaser under power of sale in security deed, who had notice that property was not exposed for sale at time and place specified in advertisement, holds possession subject to right of grantor in security deed, and her successors in title, to have accounting for rents and profits derived from the land, and to have so much thereof as may be necessary to discharge secured debt credited thereon, and, when debt should be extinguished, the property to return to the grantor or her successors in title. 149/825 (2) (102 S. E. 526).

Parol: Where deed was given to secure payment of note, and debtor transferred the land, the land may be sold to satisfy judgment on the note, though such judgment and the execution failed to show that debt was secured by deed, as such fact may be shown by extrinsic evidence. 145/490 (1) (89 S. E. 519).

Where maker of note executed deed as security, and thereafter executed another note to same payee, authorizing it to retain any security belonging to either party, it was competent to prove by aliunde evidence that the

deed securing the first note was the security to which the parties had reference. 148/367, 368 (1) (96 S. E. 996).

Where an instrument is written in form of absolute conveyance and does not within itself disclose that title is passed merely as security for debt, parol agreement extending security to additional indebtedness is not to be taken as varying terms of the instrument, and is good, as mere naming of consideration is not to be taken as stating any amount of security or limiting it to any particular sum. 23 App. 750, 751 (2) (99 S. E. 541).

Partnership: Where W. in his individual capacity executed and delivered deed to land to secure certain indebtedness due by him to L., deed stipulating that it was given to secure "any and all indebtedness" which W. "may hereafter owe" to L., and after delivery of deed W. became member of partnership which also became indebted to L., and upon dissolution of partnership with knowledge of L. its entire indebtedness due L. was assumed by W., under terms of security deed, when W. assumed debt of co-partnership, it became his debt, and was covered by the deed. 146/741 (1) (92 S. E. 214).

Petition here in action against defendant as executor, and seeking judgment against him as such, generally against the estate of testator, and specially against certain land described in a deed executed by such executor, for money loaned to operate farms of the estate, set out cause of action, and it was erroneous to dismiss action on general demurrer. 147/444 (94 S. E. 556).

Petition in equitable action brought by widow, alleging death of husband intestate, without lineal heirs, seized and possessed of certain lands, that petitioner is sole heir, has paid all debts with possible exception of one to defendants, defendants' possession and conveyance of such land, her willingness to pay balance of any indebtedness and tender thereof, and seeking accounting as to amount paid on indebtedness and rents of land, set forth cause of action against all defendants. 148/675, 676 (2) (97 S. E. 856).

Possession: Net profit which defendant realized from cultivation and use of

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land was not the sole measure of his liability on accounting. 149/825 (6) (102 S. E. 526).

Where leasehold of plaintiff is under one who, by making security deed to his creditor, had divested himself of legal title, and plaintiff has no more than mere possession of land upon which trespass is alleged to have been committed, he cannot maintain action for damages to the realty. 18 App. 269 (1) (89 S. E. 344).

Power of sale: Where purchaser was notified by donee of intention to resell unless bid was complied with, purchaser was liable for difference between bid and amount acquired on resale, though notice did not so state. 144/52 (1) (85 S. E. 1027).

Such purchaser could not, where grantee in security deed bought in the property under permission in the deed, require conveyance upon tendering purchase money. *Id.* 52, 53 (2).

Where deed authorizes grantee to sell on grantor's default, sale under such power is not invalid, in absence of fraud, because made to grantee himself. 14 App. 382 (1) (80 S. E. 904).

Where, under state of record, it is impossible to determine scope of power of sale in security deed with such certainty as to pass upon validity of sale as matter of law, and burden being upon plaintiff attacking such sale, judgment refusing interlocutory injunction will not be disturbed. 148/513 (1) (97 S. E. 441).

See **Title**.

Priorities: Where purchaser of land who executed bond for title before receiving conveyance, executed new security deed, which was accepted in lieu of the original, rights of mortgagee, who was charged with knowledge, were inferior to those of plaintiffs. 145/890, 891 (4) (90 S. E. 41).

Where grantor gave to three creditors security deeds differing in dates and amounts, and each creditor obtained judgment on his respective debt, and land was sold under *fi. fa.* based on debt secured by oldest deed, it was not error, in contest over balance of proceeds of sale, after paying *fi. fa.* under which land was sold, to apply money to other judgments based on

debts secured by other deeds, in preference to general judgment junior to security deeds but older than judgments on debts secured by them. 146/257 (91 S. E. 65).

Where A sold property to B, giving bond for title, and B created mortgage lien in favor of C, after which A conveyed property to B so that B might pass title to D, who made loan thereon with which to pay purchase money, but, under agreement between A and B, latter retained part of loan executing at same time deed to A to secure payment to him of part of money loaned by D which B retained, C's mortgage lien attached as against A, and A's lien was inferior to lien of D. 147/677 (3) (95 S. E. 244).

Where title to real estate is conveyed by duly recorded deed to secure debt, and grantee takes deed and advances money loaned without knowledge or notice of materialman's lien and before its record, title thus acquired is superior to such lien. 148/275, 276 (2) (96 S. E. 566).

Judgment in favor of transferee of bond to reconvey land, although obtained subsequently to general judgment against transferer of bond, rendered after transfer, was superior to older judgment and had superior claim to fund derived from sale of land covered by bond; it had, however, inferior claim to fund derived from sale of land of transferer not covered by the bond. 20 App. 529 (3) (93 S. E. 149).

Where B. made security deed to G. and afterwards sold land to W., subject to G's lien, taking purchase money notes and executing bond for title, and sold said notes, but did not convey title, and purchaser of notes sued W. as principal and B. as indorser, and obtained common law judgment, and W. made security deed to H., who obtained judgment against W., in which special lien was established, and land was sold under execution in favor of G., and on money rule the surplus was claimed by purchaser of notes under his judgment, intervention filed by H. was properly dismissed and surplus fund awarded to such purchaser of the notes. 20 App. 467 (93 S. E. 120).

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Purchase money: Where vendor conveyed title to enable purchaser to borrow money to pay part of purchase-price, subsequent conveyance by him to the vendor to secure balance of price was held here to be security deed. 145/17 (1) (88 S. E. 562).

Receiver: Appointment of receiver was not error here in suit on note secured by deed to land which maker had transferred to third person. 145/490, 491 (2) (89 S. E. 519).

Reconveyance: See notes to §§ 6037, 6038.

Recovery of land may be had after maturity of debt and refusal to pay by grantor. 140/46 (1) (78 S. E. 412).

See **Ejectment**.

Redeem: Where grantee, pursuant to permission in security deed, bought in land, grantor cannot defeat consummation of sale by tendering amount of debt. 144/52, 53 (4) (85 S. E. 1027).

Renewal: Where owner of land executed security deed and subsequently sold the land, and the holder of security deed surrendered it and received new one from the purchaser, the second security deed was not a mere renewal of the first, but was different contract between different parties. 145/890, 891 (2) (90 S. E. 41).

Sale: Where owner of land executed security deed, and subsequently sold land, and holder of such security deed surrendered it and received a new one from the purchaser, all rights under the first security deed were extinguished and the grantor became eliminated from the transaction. 145/890, 891 (1) (90 S. E. 41).

Where debt is secured by deed to land, creditor may transfer whole or any part of debt, and with it may convey land itself; such conveyance is not breach of bond for title to reconvey, since subpurchaser takes property subject to right of debtor to redeem on payment of loan. 21 App. 412 (3) (94 S. E. 634).

§ 3307. (§ 2772.) Record of such deeds.

Cited. 140/46 (78 S. E. 412).

Judgment against grantor, obtained after execution by him of security deed, but

Subsequent debt: Deed given as security here construed and held to secure only new indebtedness not to exceed certain amount, which grantee bank agreed to advance, and not to secure any pre-existing debt. 143/320 (85 S. E. 117).

Deed reciting that it secured existing indebtedness, as well as subsequent advances or loans to be made, will include, inter partes, such subsequent advances. 144/52, 53 (5) (85 S. E. 1027).

Time: Where conditions on which a forfeiture of time extension allowed by contract to pay certain indebtedness could be avoided were made impossible of performance by express provisions of later contract, debtor could not be held to have forfeited such extension. 19 App. 341 (91 S. E. 513).

Title: Deed executed by debtor to secure payment of debt not only created lien, but conveyed title. 143/347, 348 (85 S. E. 190).

Sale under power completely divests title of grantor. 144/52, 53 (3) (85 S. E. 1027).

Where one executes deed to secure debt and creates power of sale in grantee, and latter subsequently transfers evidences of debt in form of notes and transfers security deed by indorsing thereon "For value received I hereby transfer the within mortgage deed to" named person, but does not execute further conveyance to transferee, latter is not vested with legal title and cannot exercise power of sale. 146/93 (90 S. E. 713).

Where petition in action of complaint for land alleged that plaintiff derived title under will, and defendant under conveyance by testator purporting to be warranty deed, which was in fact security deed only, and that debt for which it was given had been paid off and discharged, and evidence was insufficient to show payment of debt in full, court properly granted nonsuit. 147/576 (94 S. E. 995).

prior to its being filed for record in county where land lies, is superior to such deed. 147/150 (93 S. E. 90).

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Common law judgment against grantor, obtained after execution of security deed by him, and entered on general execution docket within ten days from its rendition, but before actual record of security deed, is superior to such deed. 148/289 (96 S. E. 499).

Notice: Petition here in action on security deed was not subject to demurrer filed by subsequent grantee of grantor in such deed, where such grantee took with notice of the amount unpaid under such deed. 146/700 (92 S. E. 213).

Where subsequent grantees bought equity entitling them only to pay up indebtedness secured by deed and take the property, or to surplus of cash, if any, after sale of property and payment of debts, court did not err in striking from agreed statement of facts evidence in regard to placing of permanent improvements on land by such grantees, the record of the security deed being constructive notice to them and actual notice not being necessary. 146/741, 742 (2) (92 S. E. 214).

Where purchaser showed possession of property and payment of all or part of purchase money and no actual or constructive notice of any rights acquired by mortgagee, their rights were superior to those of mortgagee, so that decree for permanent injunction and cancellation of deed to secure debt was proper. 147/603, 604 (2) (95 S. E. 1).

In contest between materialman's lien which was recorded within prescribed time, and security deed executed by common debtor after material was furnished, but before record of lien, where it affirmatively appears that security deed was upon valuable consideration, and there is nothing to show actual knowledge to grantee, or knowledge of any fact sufficient to put him upon inquiry as to existence of lien, presumption arises that grantee is purchaser without notice. 148/275 (1) (96 S. E. 566).

Where instrument is written in form of absolute conveyance and does not within itself disclose that title is passed merely as security for a debt, record of conveyance puts world upon notice that no interest or equity in

the land remains in grantor, and one dealing with him thereafter could not be misled or injured by statement of consideration as contained therein. 23 App. 750, 751 (2) (99 S. E. 541).

Record of security deed, as given to secure indebtedness of specified amount, would not of itself impart notice to third person who subsequently and in good faith acquired lien upon property, of claim to seven years' previously accrued interest on the indebtedness, nor of a claim for attorney's fees. 23 App. 750, 751 (3) (99 S. E. 541).

Priorities: Record of instrument which on its face must be taken as security deed only, and which makes no reference to fact that indebtedness thereby secured was represented by promissory note or other written evidence of indebtedness, would not give priority to grantee over third person who subsequently and in good faith acquired lien on same property, except as to amount stated therein as consideration, together with subsequent interest at the legal rate of seven per cent. and ordinary or noncontractual cost of court incurred in its collection. 23 App. 750, 751 (3) (99 S. E. 541).

Purchase-money note: There is no provision of law requiring that recorded purchase-money note reserving title to personal property shall state locality of machinery or upon whose land it is located, nor need it specify county of residence of maker; the law requires that the contract shall be executed and attested in the same manner as mortgages on personal property, and recorded within thirty days from its date, in the county where the vendee resides, if a resident of this State, and provides that in other respects it shall be governed by laws relating to registration of mortgages. 21 App. 16 (93 S. E. 525).

Repeal: The Act of 1894, as codified in sections 6037 et seq., did not repeal this section, nor did it alter its effect, it not being in conflict therewith. 148/289 (96 S. E. 499).

Title: Deed given as security may convey title as between parties though not recorded as authorized by section 3323, in view of this section. 143/64 (1) (84 S. E. 123).

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Rights of purchaser in good faith under bond for title from actual owner was not affected by mortgage given

by one claiming title under actual owner, but who had no record title. 147/603, 604 (1) (95 S. E. 1).

§ 3308. (§ 2773.) **Attestation.**

Cited. 140/46 (78 S. E. 412); 18 App. 45, 47 (88 S. E. 825).

§ 3309. (§ 2774.) **To reconvey title of property conveyed to secure debt.**

Cited. 140/46 (78 S. E. 412), 569, 572 (79 S. E. 462); 145/452, 455 (89 S. E. 411).

CHAPTER 7.

Trust Deeds to Secure Debts.

§ 3317. **When the debt is due by installments.**

Cited. 140/653, 655 (79 S. E. 539).

CHAPTER 8.

Conditional Sales.

§ 3318. (§ 2776.) **Conditional sales, how executed.**

Cited. 145/831 (2) (90 S. E. 49); 16 App. 620 (85 S. E. 946); 23 App. 174, 179 (98 S. E. 171).

After-acquired property: While mortgage covering stock of goods, changing in specifics, covers also additional goods purchased in the usual course of business to replenish the stock and to keep the business going (§ 3256), there is no such statutory provision where original stock of goods is sold under a conditional bill of sale wherein title is reserved in vendor. 21 App. 730 (1) (94 S. E. 905).

Attachment: Premature sale of property attached, before judgment, does not constitute rescission of prior conditional sale by attachment plaintiff to defendant, nor estop plaintiff from prosecuting suit. 17 App. 755 (1) (88 S. E. 415).

Where personalty is delivered under conditional sale it may be seized under attachment for price, without first executing bill of sale to buyer. *Id.*

Premature sale, being void, verdict finding special lien for plaintiff

against funds realized from attachment sale was erroneous. *Id.* 755 (3).

Attestation: Where attesting notary of conditional bill of sale was an officer and stockholder in the vendor corporation, the sale conveyed the absolute title as against persons acquiring liens on the property other than contract liens acquired by parties with notice of the bill of sale. 142/93 (2) (82 S. E. 497).

Recorded contract relied on as retaining title in plaintiff until payment of purchase money for property in question, signed "O. K. Cash Grocery," appearing to have been signed in presence of subscribing witness, who in affidavit of probate stated that he saw it "duly signed and executed by O. K. Cash Grocery," and describing property as an "American Slicing Machine and Sharpener," was properly admitted in evidence, over objection that it did not appear to be signed by any person, firm, or corporation; that it was not witnessed according to law;

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that description of property was insufficient; and that paper was not entitled to be recorded. 18 App. 670 (1) (90 S. E. 366).

Bankruptcy: Where vendor recovered from bankruptcy court property sold by him under contract retaining title, there was no rescission of contract of sale, but he was required to credit upon purchase-money mortgage *fi. fa.* whatever chattels were worth. 14 App. 180, 181 (10) (80 S. E. 663).

Appointment of receiver by bankruptcy court does not oust bankrupt of title to his property seized by the receiver; and where property is sold under contract by which title is retained in vendor until payment of purchase money, vendor's title is not lost by seizure of the property by a receiver in bankruptcy of the vendee. 22 App. 684 (97 S. E. 99, 43 A. B. Rep. 402).

Composition by bankrupt with creditors as provided by bankruptcy act, made before he is adjudicated a bankrupt, and before election of a trustee, does not oust title retained under contract reserving title in vendor until payment of purchase money, unless holder of title so retained becomes party to composition and accepts its terms. 22 App. 684 (a) (97 S. E. 99, 42 A. B. Rep. 402).

Refusal of petition in bankruptcy upon composition by bankrupt with creditors before he was adjudicated a bankrupt has effect of discharging receiver and placing possession of property back into alleged bankrupt. 22 App. 684 (b) (97 S. E. 99, 42 A. B. Rep. 402).

When property is so redelivered, the holder of such title, upon proofs that he has not become party to the composition, has same legal rights open to him as if there had been no bankruptcy proceeding. *Id.* 684 (c).

Construction: Fact that contract was called throughout "rent contract," or "lease," and all payments to be made were designated as "rent" did not prevent it from being contract of conditional sale with title to property reserved in seller. 17 App. 517 (2) (87 S. E. 719).

Corporation: Attempted sale of personal property to "corporation" not yet

in existence, made to individual who claims to be agent but who gives his individual notes for purchase price, and who signs individual name to retention-of-title contract, is in law sale to individual, and vendor, by suit in trover, can recover property or value from innocent third person who had possession and who purchased at sheriff's sale, goods having been sold as property of corporation not in existence. 19 App. 706 (2) (91 S. E. 1062).

Delivery: This section does not apply where property is not delivered. 17 App. 430 (1) (87 S. E. 710).

The word "executed," as used in affidavit stating that affiant saw contract "duly signed and executed," comprehends delivery. 18 App. 670, 672 (90 S. E. 366).

Description: Requirement that conditional bill of sale specify property does not require such description as will identify property without aid of parol evidence. 16 App. 645 (1) (85 S. E. 953).

Reservation of title to automobile, described in instrument in which vendor reserved title as "Saxon car No. 22," does not effectuate retention of title in automobile designated as "Saxon runabout automobile No. O A 400." 18 App. 127 (1-a) (88 S. E. 906).

Recorded contract relied on as retaining title in plaintiff until payment of purchase money for property in question, signed "O. K. Cash Grocery," appearing to have been signed in presence of subscribing witness, who in affidavit of probate stated that he saw it "duly signed and executed by O. K. Cash Grocery," and describing property as an "American Slicing Machine and Sharpener," was properly admitted in evidence, over objection that it did not appear to be signed by any person, firm, or corporation; that it was not witnessed according to law; that description of property was insufficient; and that paper was not entitled to be recorded. 18 App. 670 (1) (90 S. E. 366).

Evidence: Incompetent to show in seller's action against buyer from seller's vendee that the seller and vendee orally changed their contract of conditional sale and that defendant's

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agent knew thereof. 143/159, 160 (2) (84 S. E. 447).

Lease: Where installment contract for sale of property retains title until payment of purchase money, and it is stipulated that if any installment is not paid vendor may take possession without legal process and all payments shall be applied as rental for said property and depreciation in value, contract is one of conditional sale and not one of lease. 23 App. 304 (2) (98 S. E. 98).

Legality: Where contractor constructed and installed light and water plant in pursuance of executory conditional contract of sale, and delivered physical possession to municipality, right of action to recover property or to enforce payment of contract price by city was necessarily dependent upon agreement by which title was reserved in him; and that agreement, being contrary to Constitution, was illegal and not enforceable in law or equity. 149/431 (3) (100 S. E. 362).

Lewd house: A conditional sale with reservation of title in the seller until payment of the price was void, where the seller knew and intended that the goods sold should be used in the maintenance of a lewd house in violation of section 382. Penal Code. 141/456 (81 S. E. 196).

Mortgage: If instrument in form of absolute bill of sale was in fact intended only as security for debt, it may be treated as equitable mortgage. 18 App. 307 (1) (89 S. E. 382).

Where contract of conditional sale, in which title to property sold was reserved in vendor until payment of purchase money, was embraced in same instrument with mortgage on other property to secure payment of debt, institution of bail-trover proceeding by vendor to recover property included in the conditional sale did not preclude him from foreclosing the mortgage. 18 App. 578 (1) (90 S. E. 101).

Instrument in which title to personal property is retained in vendor until payment of purchase price, and which contains also stipulation that it is a mortgage on the property, should be construed as a retention-of-title contract only; vendor and vendee cannot by agreement make paper one

both retaining title and not retaining title to same property. 19 App. 69 (1) (90 S. E. 1033).

Where same instrument retains title to property and also stipulates that it is a mortgage on the property, and vendor subsequently forecloses the "mortgage" and has the property sold, entire foreclosure proceedings are mere nullity, instrument not being in fact or in law a mortgage. 19 App. 69 (1-a) (90 S. E. 1033).

Foreclosure proceedings, null and void because mortgage was sought to be created by instrument retaining title to personal property, did not amount rescission of sale on part of vendor, and did not prevent or estop him from bringing suit upon retention-of-title note to recover purchase-price of property. 19 App. 69 (1-a) (90 S. E. 1033).

Instrument whereby title is retained to property sold, and title to other property as additional security is conveyed, is not a mortgage, but a conveyance carrying title for security for debt. 24 App. 416 (2) (100 S. E. 779).

Note: Renewal note reciting that it was given only to extend original conditional sale note did not extinguish old note so as to postpone it to intervening mortgage given by vendee. 142/605 (83 S. E. 225).

Novation: Where payee of note for purchase price of personalty, in which title is reserved in vendor, takes new note, and cancels and surrenders old note, consideration of new note being partly a renewal of old note and partly sale of additional property, and title to both original and additional property is reserved therein, there is such a novation of the first contract as will work discharge of original lien, as to intervening purchaser for value of any part of the original property. 19 App. 172 (91 S. E. 242).

Place: There is no provision of law requiring that recorded purchase-money note reserving title to personal property shall state locality of machinery or upon whose land it is located, nor need it specify county of residence of maker; the law requires that the contract shall be executed and attested in the same manner as mortgages on personal property, and recorded within

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thirty days from its date, in the county where the vendee resides, if a resident of this State, and provides that in other respects it shall be governed by laws relating to registration of mortgages. 21 App. 16 (93 S. E. 525).

Pleading: Overruling of demurrer as to allegations of petition as to right to foreclose a special lien held not error. 22 App. 480 (1) (96 S. E. 351).

Purchaser: Buyer of personalty previously sold under conditional sale contract properly executed and recorded, purchases at his peril, where he fails to inquire whether the purchase price has been paid. 143/159, 160 (3) (84 S. E. 447).

Vendor in conditional sale, having reserved title to property sold, bill of sale being duly recorded, where conditions of sale have not been fulfilled so as to pass title, may assert title as against purchaser at a sale under foreclosure of mortgage executed by vendee to third person. 147/27 (1) (92 S. E. 530).

Rent: Where contract with municipality for construction and equipment of light and water plant provides, in addition to payment in installments, for retention of title in contractor until contract price is fully paid, for delivery of plant after its completion to municipality as lessee, and for rental of \$1.00 per annum until all deferred payments have been made, which when done shall cause title to vest immediately in municipality, contract is one of conditional sale as distinguished from mere lease. 149/431 (2) (100 S. E. 362).

Rescinding: Evidence here sustained finding that seller had rescinded conditional sale. 142/786 (83 S. E. 783).

Retake possession: Vendor of personal chattel who has reserved title cannot, by retaking property upon agreement of vendee to rescind the sale, cut off rights of third persons which have intervened; contract of conditional sale must be enforced in accordance with statute, in order that rights of third persons which have attached to vendee's equity in the property may not be injuriously affected. 18 App. 35 (1) (88 S. E. 991).

When personal property is sold, and seller retains title as security for purchase money, and indebtedness matures in installments, he may proceed to rescind sale and to recover possession of property as soon as any of the installments become due and remain unpaid. 19 App. 159 (2) (91 S. E. 233).

Under contract of conditional sale, providing that if default should be made in payment the vendee is to return the property to the seller, the former has not the right to return the goods upon the condition being broken; upon such default by the vendee the seller has an option to demand return of the property, and the vendee has a duty to deliver it upon demand. 21 App. 160, 161 (4) (93 S. E. 1018).

Where vendee in installment contract, providing that in case of non-payment of any installment vendor may take possession without legal process, etc., default as to some of the payments, vendor, as between himself and vendee, may, under the contract, so far as mere possession of property is concerned, remove it without any legal process. 23 App. 304 (2) (98 S. E. 98).

Where third person, in good faith and without notice of conditional-sale contract, under which, in default of payment of installment, vendor could take possession without any legal process, has acquired property from vendee and is in possession thereof, and such possession is taken from him by vendor, without legal process and without his consent, he is entitled to judgment in possessory-warrant proceeding instituted by him against vendor. 23 App. 304 (2) (98 S. E. 98).

Signature: Recorded contract relied on as retaining title in plaintiff until payment of purchase money for property in question, signed "O. K. Cash Grocery," appearing to have been signed in presence of subscribing witness, who in affidavit of probate stated that he saw it "duly signed and executed by O. K. Cash Grocery," and describing the property as an "American Slicing Machine and Sharpener," was properly admitted in evidence, over objection that it did not appear to be signed by any person, firm, or corporation; that it was not witnessed

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according to law; that description of property was insufficient; and that paper was not entitled to be recorded. 18 App. 670 (1) (90 S. E. 366).

Contract reciting sale of N. B., but signed by C. W. B., and not by N. B., was sufficient to retain title in vendor. 22 App. 728 (1) (97 S. E. 197).

Third parties: Facts here construed and held that third party obtained no title to mules as against buyer in contract of conditional sale. 140/540 (79 S. E. 144).

Written contract of conditional sale, duly attested and recorded within 30 days from date of delivery of property, becomes effective as against third persons from date of such delivery, even though date of execution of contract does not appear therein. 13 App. 591 (79 S. E. 482).

A judgment creditor whose lien is obtained before conditional sale is made is not one of the third parties referred to in this section. 13 App. 764 (79 S. E. 952).

Third parties means such creditors as have secured a lien upon the property. 19 App. 69 (2) (90 S. E. 1033).

Title: Under sections 3259, 3318, 3319, where one selling goods on credit delivers possession under duly recorded written contract reserving title until price is paid, legal title does not vest in buyer until price has been paid. 144/694 (2) (87 S. E. 891).

Transfer: Assignee of note representing price of personal property to which seller retained title was entitled to set up title in claim case, though assignment was "without recourse." 17 App. 473 (1) (87 S. E. 696).

Transfer of note was unconditional assignment sufficient to transfer security for payment of note. *Id.*

Trover: Where buyer refuses on delivery of building material to execute note secured by conditional sale contract as agreed, seller may recover the goods in trover. 142/308 (1) (82 S. E. 887).

Bail trover to recover a portion of the goods was a repudiation of the contract of conditional sale in its entirety. *Id.*

Contract to sell, reserving title until price is paid, may be rescinded by the seller, so as to entitle him to

bring trover, where buyer refuses to pay or execute notes secured by conditional sale contract, as agreed. 142/309 (4) (82 S. E. 888).

Where seller omits to disaffirm sale after buyer's refusal to give the notes, but instead filed a lien for the building material sold he can not thereafter repudiate the sale. *Id.*

Where, after sheriff's sale of property transferred under conditional sale contract, original seller brought trover against purchaser at such sale and elected to take money verdict, it was not error, where facts were agreed upon, to direct verdict for plaintiff for amount due on purchase price. 144/694 (5) (87 S. E. 891).

In bail-trover for goods sold under conditional sale, agreed selling price is, as between original parties, prima facie evidence of actual value of property. 17 App. 58 (1) (86 S. E. 278).

Suing out of attachment so defective, that no judgment could be rendered thereon will not preclude seller of goods on conditional bill of sale from proceeding in bail trover. *Id.* 58 (2).

Fact that seller sued out attachment for price before proceeding in bail trover did not estop him from maintaining trover. *Id.*

Purchaser here under contract for sale of piano on installments could not, by a sale, transfer title where all installments were not paid, and sale by him amounted to conversion. 145/671 (89 S. E. 715).

Direction of verdict for plaintiff in trover for mule was error, where from evidence it appeared that he based his claim on purchase of mule from defendants under duly recorded contract reserving title until payment of price, which became due one day after date and was never fully paid, that he soon voluntarily abandoned the mule and left it to starve, and that his wife being unable to care for or feed it, took it to a third person, who, haying nothing to feed it with, allowed vendors to take possession of it. 22 App. 162 (95 S. E. 762).

Demand by plaintiff for machine sold to defendant was not necessary before action of trover therefor where title was retained in vendor until full payment of price and defendant refused

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to pay agreed price in full, contending that property was worthless to him. 23 App. 422 (1) (98 S. E. 365).

Seller of personal property on credit may take note for purchase price and retain, as security for debt, legal title to property so sold, and in same instrument, to better secure debt, title to other personal property may be passed by purchaser, and, where note is not paid when due, seller may recover property in trover; when vendor elects to take money verdict purchaser is entitled to credit for such sums of money as may have been paid upon note. 24 App. 416 (1) (100 S. E. 779).

§ 3319. (§ 2777.) **How recorded.**

Cited. 145/831 (2) (90 S. E. 49).

Applied. 140/540, 543 (79 S. E. 144).

County: Where property held by buyer in county other than that in which conditional sale contract was recorded, was levied on for occupation tax and sold, buyer took subject to original seller's right. 144/694 (4) (87 S. E. 891).

Description: Duly recorded purchase-money note reserving title to personal property described as, "the following machinery sold to the undersigned by C. Gin Co., viz.: 3 70 saw R. H. Winship plain gins; 3 70 saw class C feeders; 1 210 saw condenser with support and flues; 1 20 saw lint flue; 1 30 inch cylinder D. B. steam power press with transfer and feedings; 1 10 inch class C elevator as per contract; shaftings, pulleys, and belting as per contract," was sufficient to afford record notice to third persons of fact that title to property was in vendor, it also appearing that, following contract of sale, vendees took possession of property, and that it remained in their hands and was operated by them for an entire ginning season. 21 App. 16 93 S. E. 525).

Evidence here showed that county in which conditional sale contract was recorded was county in which vendees resided. 19 App. 600 (3) (91 S. E. 920).

Failure: Third person in possession of sewing machine sold under unrecorded conditional sale contract and who in good faith and without notice of con-

Value: As between original seller and original purchaser, agreed price as stated in contract of sale is *prima facie*, but not conclusive, evidence of actual value of property. 19 App. 159, 160 (1) (91 S. E. 233).

Writing: Conditional bills of sale must be in writing, in order to be effective against third persons. 143/159, 160 (2) (84 S. E. 447).

One who recovers judgment against buyer before conditional sale was reduced to writing, and levies execution before it was recorded, may take property regardless of claims of seller. 145/449 (89 S. E. 409).

tract bought machine and acquired possession in peaceable manner, was entitled to retain possession. 17 App. (2) (87 S. E. 719).

Filing with clerk of bill of sale is not compliance with provision that such instrument shall actually be recorded; rights of innocent purchasers for value are not affected by mere filing of conditional bill of sale with reservation of title to property purchased without notice. 18 App. 526 (1) (89 S. E. 1050).

Mortgage: There is no provision of law requiring that recorded purchase-money note reserving title to personal property shall state locality of machinery or upon whose land it is located, nor need it specify county of residence of maker; the law requires that the contract shall be executed and attested in the same manner as mortgages on personal property, and recorded within thirty days from its date, in the county where the vendee resides, if a resident of this State, and provides that in other respects it shall be governed by laws relating to registration of mortgages. 21 App. 16 (93 S. E. 525).

Notice: Record of conditional sale contract is notice to third persons, though property is thereafter removed to another county by purchaser with seller's knowledge and consent. 144/694 (3) (87 S. E. 891).

Place of record: In order that reservation of title to personalty be valid against third persons, where buyer is resident of State, it is essential that

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contract of sale be recorded in county where he resides when it is executed. 141/831 (1) (82 S. E. 251).

Probate: Title-retention note not properly probated is not entitled to record; makers of note delivering to payee a note so improperly executed that it cannot be recorded are estopped from thereafter pleading that it was duty of payee to have note recorded. 19 App. 69 (2) (90 S. E. 1033).

Third parties: Retention-of-title contract must be probated and recorded only as against third parties; as between parties themselves and persons who have notice, reservation of title is good whether recorded or not. 19 App. 69 (2) (90 S. E. 1033).

Time: Written contract of conditional sale duly attested and recorded within 30 days from date of delivery of property, becomes effective as against third persons from date of such delivery, even though date of execution of contract does not appear therein. 13 App. 591 (79 S. E. 482).

Though conditional sale contract was not recorded within 30 days, seller could recover property from one who acquired it by gift from buyer. 16 App. 620 (85 S. E. 946).

Under this section and section 3260, record of conditional sale within thirty days is not necessary as against unsecured creditors of buyer. 224 Fed. 266 (1).

One who recovers judgment against buyer, before conditional sale was reduced to writing, and levies execution before it was recorded, may take property regardless of claims of seller. 145/449 (89 S. E. 409).

Title: Under sections 3259, 3318, 3319, where one selling goods on credit delivers possession under duly recorded written contract reserving title until price is paid, legal title does not vest in buyer until price has been paid. 144/694 (2) (87 S. E. 891).

Where personal property is sold under conditional contract of sale and series of notes is given for purchase price, each containing reservation of title until payment of entire purchase-price, and each properly executed and attested, and last one, referring to other notes of series and containing all of stipulations as to conditions of sale, is duly recorded, title to property remains in vendor until full payment of purchase money. 24 App. 474 (1) (101 S. E. 396).

CHAPTER 9.

Registration of Transfers and Liens.

§ 3320. (§ 2778.) Instruments requiring record take effect, when.

Cited. 16 App. 620 (85 S. E. 946).

Benefit of public is object of registration laws. 140/48, 50 (78 S. E. 467).

Contract: There is no provision of law requiring record of written instrument guaranteeing performance of contract for services of salesman. 19 App. 295 (2) (91 S. E. 489).

Failure: Under Code 1882, section 2705 (section 4198), where before enactment of section 3320, in 1889, there was a contest between two deeds, neither of which was recorded within 12 months, the older deed prevailed. 143/98, 100 (6) (84 S. E. 426).

Rights of purchaser in good faith under bond for title from actual owner was not affected by mortgage given by

one claiming title under actual owner, but who had no record title. 147/603, 604 (1) (95 S. E. 1).

Filed: Mortgage filed with clerk of superior court of county in which land lies is superior to lien of common-law execution entered on docket after such filing, though mortgage is not properly recorded. 14 App. 81 (1) (80 S. E. 343).

Judgment against grantor, obtained after execution by him of security deed, but prior to its being filed for record in county where land lies, is superior to such deed. 147/150 (93 S. E. 90).

Priorities: Where purchaser showed possession of property and payment of all or part of purchase money and no

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actual or constructive notice of any rights acquired by mortgagee, their rights were superior to those of mortgagee, so that decree for permanent in-

junction and cancellation of deed to secure debt was proper. 147/603, 604 (2) (95 S. E. 1).

§ 3321. (§ 2779.) **General execution docket.** The clerk of the superior court of each county shall be required to keep a general execution docket; and as against the interest of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the defendant's property, no money judgment obtained within the county of the defendant's residence, in any court of this State, whether superior court, ordinary's court, county court, city court, or justice court, or United States court in this State, [municipal court or other courts] (a) shall have a lien upon the property of the defendant from the rendition thereof, unless the execution issuing thereon shall be entered upon said docket within ten days from the time the judgment is rendered. When the execution shall be entered upon the docket after the ten days, the lien shall date from such entry.

Acts 1889, p. 106. (a) Acts 1921, p. 115.

§§ 5973, 4355, 5944, 3325, 5950, 4914 (4), 6018, 4357 (a), 3322, 3322 (a) .

Applied. 142/615, 616 (83 S. E. 229).

Clerk of court: Where judgment was rendered against defendant and his surety in bail trover proceeding, and clerk of superior court issued execution against principal only, which was so entered upon execution docket, and loss resulted to plaintiff, plaintiff in execution has no right of action against clerk for damages, unless it appears that he failed or refused to properly issue and docket execution after express direction given him by plaintiff or his attorney. 19 App. 294 (2) (91 S. E. 437).

Index: Fact that execution entered in docket kept in substantial compliance with this section is improperly indexed, and third persons thereby misled to their injury, will not prevent entry from operating as legal notice. 14 App. 81 (2) (80 S. E. 343).

Judgments: Where one obtains judgment in superior court and fails to have execution issued and recorded, lien of judgment is lost as against property conveyed by defendant in judgment to purchaser without notice,

subsequently to expiration of period provided for entry of execution on general execution docket and before entry of execution thereon. 148/198 (1) (96 S. E. 225).

Parties: As between parties to suit it is not necessary that execution be entered on general execution docket; this is only required for protection of innocent third parties who may acquire lien upon property affected by judgment, and burden is upon third parties to show that they are innocent purchasers without notice. 147/265 (6) (93 S. E. 418).

Priorities: Fact that fl. fa. on senior judgment was not issued and recorded until after fl. fa. on junior judgment had been issued and recorded does not affect priority of older judgment. 20 App. 741, 742 (3) (93 S. E. 236).

Time: Fact that motion for new trial was filed by defendant in judgment after period within which entry of execution on general execution docket is required did not extend time prescribed for entry of execution. 148/198 (2) (96 S. E. 225).

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§ 3322. (§ 2780.) **Judgments take effect against property out of county, when.**

Cited. 144/302, 305 (87 S. E. 295).

Applied. 142/615, 616 (83 S. E. 229).

§ 3323. (§ 2781.) **Not affect validity as between parties.**

Title: Deed given as security may convey title as between parties though not recorded as authorized by this section, in view of section 3307. 143/64 (1) (84 S. E. 123).

§ 3325. (§ 2783.) **Judgment against non-residents recorded on execution docket.**

Applied. 142/615, 616 (83 S. E. 229).

CHAPTER 10

Liens Other than Mortgages.

ARTICLE 1.

To Whom Granted, Rank and Priority.

§ 3329. (§ 2787.) **Liens established.**

General Note.

Cited. 13 App. 420, 422 (79 S. E. 213).

§ 3330. (§ 2788.) **Certain liens confirmed.**

Cited. 15 App. 778, 782 (84 S. E. 222).

§ 3331. (§ 2789.) **Liens under charters.**

Shares: Where none is provided by statute or charter or by-laws, a corporation has no lien on its shares as against the holders thereof. 149/280 (1) (99 S. E. 851).

§ 3333. (§ 2791.) **Rank of liens for taxes.**

Bondholders: State's lien for taxes was superior to right of bond holder under trust deed and his judgment thereon. 145/336, 337 (3) (89 S. E. 216).

Receivers: Tax executions for taxes due for period immediately preceding receivership of property, and fund in court being derived from rents of property collected by receiver, should be paid to transferee of executions out of such fund, second in priority only to costs of proceeding. 147/158 (1) (93 S. E. 86).

Attorney for plaintiff in equitable suit, wherein receiver was appointed, whose fee was to be paid out of property recovered for his client, had superior lien on fund after costs of proceeding and taxes. 147/158 (3) (93 S. E. 86).

§ 3334. (§ 2792.) **Lien of laborers, general.**

Cotton: Where verdict on trial of issue made by counter-affidavit on foreclosure of laborer's lien was for certain number of pounds of seed-cotton,

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in addition to stated sum of money, and there was no evidence as to value of the seed-cotton, finding as to the seed-cotton was void; it could not be upheld as a finding as to plaintiff's title to the cotton. 22 App. 763 (1) (97 S. E. 205).

Cropper: Fact that cropper has laborer's lien on crops raised by him and is entitled to foreclose it does not prevent him from suing his landlord for amount of indebtedness due under his contract; remedy given by sections 3334, 3365, and 3366 is not exclusive, and does not deprive laborer of his common-law right to sue upon a contract, but is merely cumulative of that right. 19 App. 79 (1) (90 S. E. 1039).

Manual labor: Allegations that plaintiff sold general merchandise, hauled freight, had cotton gin, hauled seed-

cotton, hauled cotton from fields, opened freight, put up goods, swept and sprinkled floors, made deliveries to customers outside of store, etc., were sufficient to show that plaintiff was entitled to foreclose lien as laborer. 22 App. 79 (1) (95 S. E. 375).

Verdict: Where jury find in favor of plaintiff, on trial of issue made by counter-affidavit on foreclosure of laborer's lien, verdict must be for fixed sum of money or amount of finding must be ascertainable from record. 22 App. 763 (1) (97 S. E. 205).

Washing: Though plaintiff had done no washing for defendant for more than two months past, and was not in possession of any of his clothing or goods, and was not at time laborer's lien was sued out, she was entitled to lien. 20 App. 629 (93 S. E. 421).

§ 3335. (§ 2793.) Special lien of laborers.

Cotton: Where verdict on trial of issue made by counter-affidavit on foreclosure of laborer's lien was for certain number of pounds of seed-cotton, in addition to stated sum of money, and there was no evidence as to value of the seed-cotton, finding as to the seed-cotton was void; it could not be upheld as a finding as to plaintiff's

title to the cotton. 22 App. 763 (1) (97 S. E. 205).

Verdict: Where jury find in favor of plaintiff, on trial of issue made by counter-affidavit on foreclosure of laborer's lien, verdict must be for fixed sum of money or amount of finding must be ascertainable from record. 22 App. 763 (1) (97 S. E. 205).

§ 3336. Laundrymen, liens in favor of.

Possession: Judgment for plaintiff who asserted laborer's lien for washing done was not in violation of this section, though plaintiff had done no

washing for defendant for two months and was not in possession of any of his clothing or goods. 20 App. 629 (93 S. E. 421).

§ 3337. How enforced.

Possession: Judgment for plaintiff who asserted laborer's lien for washing done was not in violation of this section, though plaintiff had done no

washing for defendant for two months and was not in possession of any of his clothing or goods. 20 App. 629 (93 S. E. 421).

§ 3339. (§ 2794.) Rank of laborers' liens, and how they arise.

Cited. 149/787, 795 (102 S. E. 528).

Bona fide purchaser of personal property, taken in payment of antecedent debt before property was seized under levy of laborer's general lien, takes priority over such lien. 17 App. 473 (87 S. E. 701).

That one is seen laboring for another is not notice sufficient to sub-

ject, as against bona fide purchaser, employer's property to general lien of laborer. *Id.*

Completion: Ordinarily, before laborer's lien can be foreclosed, it must be shown that laborer has fully completed contract; however, if completion of contract was waived or prevented by other party thereto, this is equivalent

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to completion of same, as a remedial element. 18 App. 449 (1) (89 S. E. 603).

Where landlord makes contract with cropper, under which landlord is to furnish land and fertilizer, and cropper is to do all the work in connection

with planting, making, and gathering the crop, the cropper is not entitled to enforce laborer's lien before completion of contract, unless for some sufficient legal reason he is prevented from carrying out the contract. 19 App. 655 (91 S. E. 1052).

§ 3340. (§ 2795.) **Landlord's lien.**

Cited. 16 App. 345 (85 S. E. 356); 149/787, 795 (102 S. E. 528).

Advances: Landlord's special lien for advances can be enforced only on crops of year in which advances were made. 143/393, 394 (2) (85 S. E. 196).

Crops: Where it was not shown by affidavit to foreclose, or warrant issued thereon, or the levy, that levy was upon crops grown upon rented premises, dismissal of levy was not error. 23 App. 640 (2) (99 S. E. 143).

Distress warrant: Where landlord foreclosed his lien by distress warrant, his claim on funds was superior to that of mortgagees who foreclosed mortgage on crops of tenant and placed mortgage *fi. fa.* in hands of sheriff, and court did not err in directing verdict for the landlord, upon trial of money rule against the sheriff. 21 App. 535, 536 (5) (94 S. E. 863).

Fi. fas.: Where *fi. fas.* on common-law judgments are levied on crops grown by defendant on rented land, and crops are sold, and before application of proceeds of sale to the *fi. fas.*, landlord forecloses lien for supplies, in rule to distribute money, in absence of equitable grounds, error to award net funds to landlord's lien in preference over the *fi. fas.* 145/224 (2-a) (88 S. E. 941).

Foreclosure: Where rent is payable in money, and landlord receives crops in satisfaction of rent, he takes them subject to lien of older judgment, and must assert priority of lien by foreclosing it and claiming proceeds of sale of crops. 17 App. 45 (3) (86 S. E. 94).

Landlord's lien for supplies arises by virtue of statute when supplies are furnished, but such lien cannot be asserted against tenant's crop except by foreclosure. 24 App. 464 (101 S. E. 311).

Where landlord had not foreclosed lien for supplies when tenant's crops

were sold, his lien could not be asserted by foreclosure, in absence of sufficient equitable reasons. 24 App. 464 (101 S. E. 311).

Landlord who had not foreclosed lien for supplies when tenant's crops were sold, and who therefore could not assert lien by foreclosure who filed paper in nature of intervention, attempting to set up equitable claim to fund, on ground that tenant was insolvent, had burden of establishing his alleged equity by evidence. 24 App. 464 (101 S. E. 311).

Homestead: Landlord's rent lien on crops raised on rented premises is in nature of purchase money, and is superior to homestead exemption set apart out of the crops. 23 App. 640 (1) (99 S. E. 140).

Prior year: Lien for balance of indebtedness for prior year could not be enforced against crops of subsequent year, even by agreement at beginning of later year, though renewal notes were given for the prior indebtedness. 143/393, 394 (2) (85 S. E. 196).

Purchaser of crops received by landlord in payment of money rent, which were subject to judgment lien, is in no better position than landlord. 17 App. 45 (3) (86 S. E. 94).

Bona fide purchaser, without notice, of crop grown on rented premises, will be protected against lien, general or special, of the landlord for rent. 24 App. 404 (1) (100 S. E. 794).

In distress for rent due, with claim by alleged bona fide purchaser of crop from tenant, charge that if defendant in *fi. fa.* was indebted to plaintiff in *fi. fa.* for rent for year in which crop was raised, and sold crop to claimant without notice that rent was due, property would be subject to *fi. fa.*, was erroneous. 24 App. 404 (2) (100 S. E. 794).

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Rank of general liens: See § 3341 and notes.

Special lien on crops of tenant arises by operation of law, and is superior to all other liens, except liens for taxes. 21 App. 535 (2) (94 S. E. 863).

Subtenant: Crop produced on any part of rented land is liable for whole rent, though produced by subtenant, unless landlord assented to or ratified the sub-letting. 143/479 (1) (85 S. E. 315).

Landlord seeking to collect whole rent out of subtenant's crop should account for such an amount as rental value of land subrented by landlord himself from tenant bears to entire rental value. *Id.* 479 (2).

Tenant cannot consent to any application of subject-matter of lien for rent, which would leave lien in force to prejudice of subtenant, nor can landlord apply tenant's crop to independent indebtedness to injury of subtenant. *Id.* 479 (3).

§ 3341. (§ 2796.) Rank of such lien.

Cited. 149/787, 795 (102 S. E. 528).

Bankruptcy: Trustee in bankruptcy of tenant has lien superior to claim of landlord, under this section, where landlord did not take out distress warrant until after bankruptcy. 223 Fed. 878 (2); s. c. 35 A. B. Rep. 114.

Landlord of other than farm lands has lien entitling him to priority of payment. 224 Fed. 132; s. c. 35 A. B. Rep. 335.

Lien of landlord for rent prior to distress is not superior to lien given trustee in bankruptcy by Federal Bankruptcy Act. 231 Fed. 933; s. c. 146 C. C. A. 129; s. c. 36 A. B. Rep. 747.

Foreclosure: Landlord's lien for supplies arises by virtue of statute when supplies are furnished, but such lien cannot be asserted against tenant's crop except by foreclosure. 24 App. 464 (101 S. E. 311).

Where landlord had not foreclosed lien for supplies when tenant's crops were sold his lien could not be asserted by foreclosure, in absence of sufficient equitable reasons. 24 App. 464 (101 S. E. 311).

Landlord who had not foreclosed lien

Crop produced on any part of rented premises is liable for whole rent, though produced by subtenant, unless landlord or his transferee assented to or ratified sub-letting. 16 App. 355 (1) (85 S. E. 358).

Where tenant sublets land without landlord's permission, landlord is entitled to make his rent out of the crop grown on the land by the subtenant, on distress warrant issued against principal tenant. 19 App. 184 (1) (91 S. E. 214).

Third person: That tenant of premises for a rent payable from part of crops had contracted to deliver to third party certain parts of crop raised from seed furnished by such party, who under contract retained title to crop, would not destroy landlord's lien for rent on all the crops raised, including those described in such contract. 24 App. 387 (3) (100 S. E. 775).

for supplies when tenant's crops were sold, and who therefore could not assert lien by foreclosure, who filed paper in nature of intervention, attempting to set up equitable claim to fund, on ground that tenant was insolvent, had burden of establishing his alleged equity by evidence. 24 App. 464 (101 S. E. 311).

Levy: Landlord may place his lien, not foreclosed until day of sale of crop under mortgage foreclosure, in levying officer's hands, and thereafter by rule require that so much of proceeds as are necessary be applied to satisfy lien. 17 App. 569 (1) (87 S. E. 839).

Landlord's failure to foreclose lien before property was levied on under execution on judgment did not prevent him from claiming priority of lien over judgment. 17 App. 585 (87 S. E. 840).

Lien of distress warrant upon property other than crops raised on rented premises attaches only from date of its levy. 21 App. 270 (2) (94 S. E. 288).

Mortgage: Landlord's general lien for rent is inferior to lien of mortgages executed before levying of distress warrant. 236 Fed. 723 (2); s. c. 38 A. B. Rep. 93; s. c. 150 C. C. A. 55.

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§ 3342. (§ 2797.) Foreclosed by distress warrant.

Cited. 15 App. 345, 346 (85 S. E. 356).

§ 3343. (§ 2798.) Transferees of liens.

Purchaser: Where landlord after transferring rent notes to bank sold property before maturity of crops, the purchaser and not the bank was entitled, notwithstanding this section, to enforce the landlord's lien for rent. 143/55 (84 S. E. 122).

Supplies: Assignee of landlord's lien for supplies "without recourse," who neglects to foreclose on maturing of crop, can not force landlord to apply to lien any proceeds of crop in landlord's hands due as wages to cropper. 16 App. 725 (86 S. E. 86).

§ 3344. (§ 2799.) Foreclosure.

Cited. 16 App. 725, 726 (86 S. E. 86).

§ 3345. Liens, how transferred.

Cited. 16 App. 725, 726 (86 S. E. 86).

Construction: This section should be construed in connection with section 4276. 140/603, 606 (79 S. E. 540).

Purchase money notes: Sections 3345 and 4276 apply to note secured by mortgage and other liens, and do not contemplate purchase money notes which are not so secured, but in connection with which there is contract reserving title, or bond to convey title on payment of purchase money. 148/27 (1-b) (95 S. E. 690).

Where suit in trover for an automobile was brought by S. Auto Company, and claim of title was based on purchase-money note retaining title, given by certain persons to such company, copy of note being attached to petition, note signed by such persons, but payable to S. & M. Hardware Co., was not admissible, in absence of evidence of transfer or assignment in writing from S. & M. Hardware Co. to S. Auto Company, or of evidence that it was, by clerical mistake, inadvertently made to hardware company. 22 App. 608 (4) (96 S. E. 705).

Rent note: Distress warrant, based upon rent note payable to order of landlord, and indorsed by him in blank, may be

sued out by holder of note in his own name. 146/233 (2) (91 S. E. 71).

Repeal of section 4276 not affected by sections 3345-3347. 140/603, 606 (79 S. E. 540).

Scope: This section, properly construed, is unrestricted as to manner of transfer; consequently it applies where transfer is by indorsement of note without recourse, as well as where indorsement is not so restricted. 148/27 (1-a) (95 S. E. 690).

Transfer: Where vendor executed bond for title and delivered possession of land, and vendee rented such land and transferred rent contracts to vendor, legal effect of transfer was to place title to rent contracts in transferee and to carry liens as necessary incident thereof, with right in transferee to enforce liens arising under the contracts. 23 App. 416 (98 S. E. 412).

Fact that transfer or assignment of purchase money note reserving title in property is made "without recourse" on payee will not operate to divest note of its character as debt for purchase money with retention of title to property. 149/157 (2) (99 S. E. 289); 24 App. 3 (2) (99 S. E. 475).

§ 3346. Transfer carries the lien.

Construction: This section should be construed in connection with section 4276. 140/603, 606 (79 S. E. 540).

Indorsement in blank: Indorsement by payee of his name on back of mort-

gage note, for value, conveyed such note, together with the mortgage lien. 140/603 (1) (79 S. E. 540).

Distress warrant, based upon rent note payable to order of landlord, and

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indorsed by him in blank, may be sued out by holder of note in his own name. 146/233 (2) (91 S. E. 71).

Purchase money notes: The right of a holder of a note for purchase money reserving title in property until note is paid to recover property in action of trover upon failure of maker of note to pay same follows the note through any number of transfers or assignments; this is true whether transfer makes reference to the property to which title is reserved or not. 149/157 (3) (99 S. E. 289); 24 App. 3 (3) (99 S. E. 475).

Where there are several transfers of a note for purchase money reserving title until note is paid, some of which

contain words "without recourse" and others do not, last holder may sue in trover for property to which title is reserved. 149/157 (4) (99 S. E. 289); 24 App. 3 (4) (99 S. E. 475).

Repeal of section 4276 not effected by sections 3345-3347. 140/603, 606 (79 S. E. 540).

Title: Where vendor executed bond for title and delivered possession of land, and vendee rented such land and transferred rent contracts to vendor, legal effect of transfer was to place title to rent contracts in transferee and to carry liens as necessary incident thereof, with right in transferee to enforce liens arising under the contracts. 23 App. 416 (98 S. E. 412).

§ 3347. Power to foreclose.

Cited. 15 App. 778, 782 (84 S. E. 222).

Blank indorsement: Distress warrant, based upon rent note payable to order of landlord, and indorsed by him in blank, may be sued out by holder of note in his own name. 146/233 (2) (91 S. E. 71).

Construction: This section should be construed in connection with section 4276. 140/603, 606 (79 S. E. 540).

Repeal of section 4276 not effected by sections 3345-3347. 140/603, 606 (79 S. E. 540).

Simple transfer: Note and mortgage being embodied in a single instrument, and indorsement and delivery thereof being sufficient to transfer title to the note payable to order, it was a sufficient "simple transfer" of the en-

tire paper to carry title thereto to the person to whom it was delivered so indorsed. [Word "simple" appears in original Act immediately preceding word "transfer" in first line, but was inadvertently omitted from the section as originally codified. Editor.] 140/603, 606 (79 S. E. 540).

Title: Where vendor executed bond for title and delivered possession of land, and vendee rented such land and transferred rent contracts to vendor, legal effect of transfer was to place title to rent contracts in transferee and to carry liens as necessary incident thereof, with right in transferee to enforce liens arising under the contracts. 23 App. 416 (98 S. E. 412).

§ 3348. (§ 2800.) Liens for supplies, etc., furnished.

Cited. 16 App. 345, 346 (85 S. E. 356).

1.

Agent: Upon foreclosure of landlord's special lien for supplies, although affidavit made to secure issuance of execution therein may be made by agent of landlord, yet when it appears that affidavit is made by such an agent, execution should issue in favor of principal; where execution issued in favor of D., agent for M., it was in favor of D. individually, and words "agent for M." were merely descriptio personae, and motion of defendant to dismiss proceeding against him on

such ground should have been granted. 20 App. 138 (1) (92 S. E. 763).

Foreclosure: Though landlord's lien for supplies arises by virtue of statute when supplies are furnished, such lien can not be asserted against tenant's crop except by foreclosure. 145/224 (2) (88 S. E. 941).

Where landlord had not foreclosed lien for supplies when tenant's crops were sold his lien could not be asserted by foreclosure, in absence of sufficient

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equitable reasons. 24 App. 464 (101 S. E. 311).

Landlord who had not foreclosed lien for supplies when tenant's crops were sold, and who therefore could not assert lien by foreclosure who filed paper in nature of intervention, attempting to set up equitable claim to fund, on ground that tenant was insolvent, had burden of establishing his alleged equity by evidence. 24 App. 464 (101 S. E. 311).

Landlord's lien for supplies arises by virtue of statute when supplies are furnished, but such lien can not be asserted against tenant's crop except by foreclosure. 24 App. 464 (101 S. E. 311).

Levy: Landlord may place his lien, not foreclosed until day of sale of crop under mortgage foreclosure in levying officer's hands, and thereafter by rule require that so much of proceeds as are necessary be applied to satisfy lien. 17 App. 569 (1) (87 S. E. 839).

Mules: Landlord entitled to lien for advancement to enable tenant to keep, to make the crop, mules which tenant

3.

Prior year: Special lien given to landlords upon crops of their tenants embraces only crops of year in which advances are made; where exhibit attached to affidavit of foreclosure and evidence submitted for plaintiff showed that all advances upon which proceeding was based were made not later than 1914, and that lien claimed was upon crops of 1915, proceeding was not maintainable. 20 App. 138 (2) (92 S. E. 763).

Where agreed statement of facts showed that mule and other articles had been furnished by plaintiff during 1915, and that lien which he sought to foreclose was upon crops of year 1916, court did not err in sustaining counter-affidavit of defendant, although statement of facts showed also that relation of landlord and tenant as between the parties extended over year 1916 under separate contract, and that

6.

Judgments: Landlord's failure to foreclose lien before property was levied on under execution on judgment did

had bought, but not fully paid for. 144/181 (2) (86 S. E. 537).

Relation: Where one person rents to another land on which to make crop, contract raises relation of landlord and tenant, within meaning of this section. 144/181 (1) (86 S. E. 537).

Not essential to foundation of lien that tenant, in addition to making contract, enter into actual possession before advancement is made. *Id.*

Subtenant's crop: Crop produced on any part of rented premises is liable to special lien of landlord for supplies furnished to tenant to make crop, whether produced by tenant or his subtenant. 143/479, 480 (85 S. E. 315).

Time: Where advancement is made in November to enable tenant to make crop for ensuing year, landlord's lien attaches to crop for that year. 144/181 (3) (86 S. E. 537).

Use of supplies furnished need not be proved, it being sufficient to show that landlord actually furnished supplies and intended them to be used. 18 App. 260 (1) (89 S. E. 380).

articles which had been furnished during previous year were of necessity for making crops of both the years 1915 and 1916. 21 App. 613 (2) (94 S. E. 829).

Time: Lien given to landlords for supplies, etc., furnished to their tenants in making of crops can be foreclosed only on such crops of the year in which the advances are made, and a *fi. fa.* issued under such a foreclosure can not be levied upon or claim other property. 21 App. 270 (2) (94 S. W. 288).

While liens in favor of landlords furnishing supplies arise by operation of law from relation of landlord and tenant, whenever landlord furnishes any of the articles enumerated in this section for the purpose named therein, the lien extends only to the crops of the year in which such things are done or furnished. 21 App. 613 (1) (94 S. E. 829).

not prevent him from claiming priority of lien over judgment. 17 App. 585 (87 S. E. 840).

 Liens other than mortgages.

§ 3349. Mortgages on crops, when superior to older judgment.

Evidence: In contest between chattel mortgagee and one claiming by virtue of execution under prior mortgage, evidence of mortgage execution and levy thereof is admissible. 17 App. 33 (3) (86 S. E. 260).

Where party was entitled to priority by lien of his chattel mortgage, which exceeded fund in controversy, invalidity of other liens claimed was immaterial. *Id.* 33, 34 (4).

Insolvents: Purpose of this act was to give such preference to mortgage creditor who furnished money or supplies to aid in making crop as would enable insolvents to pursue their vocation of farming. 13 App. 420 (2) (79 S. E. 213).

Judgments, as used in this section, so far as applicable to proceedings by rule brought to distribute funds in

custody of the law, includes any final process under which the property was brought to sale or could have been legally sold. 13 App. 420 (2) (79 S. E. 213).

Levy: Lien of crop mortgage given for supplies is superior to lien of older common-law judgment, though mortgage was executed after supplies were furnished and execution was levied under judgment. 17 App. 33 (2) (86 S. E. 260).

Planting of crop is condition precedent to mortgage thereon. 143/312 (85 S. E. 119).

Record: Lien of mortgage on crop is superior to lien of previously recorded mortgage not given to secure payment of debt created to aid in making and gathering particular crop. 13 App. 420 (1) (79 S. E. 213).

§ 3352. (§ 2801.) Liens of mechanics, etc.

1.

Contractors: Lien of contractor on real estate improved under contract with owner attaches from time work is commenced, and takes priority over title acquired, with actual notice of contractor's claim of lien, by subsequent grantee in trust deed from owner of real estate, although deed was executed and recorded before completion of contract and before claim of lien was recorded and before commencement of action to recover amount of claim. 149/787 (102 S. E. 528).

See Notice.

Estoppel: When, at time material is furnished, owner of property represents to seller that material contracted for is intended to be used in improvement of certain property, and seller, relying upon statement, actually and in good faith furnishes it for purpose stated, owner will be estopped by his representation; as between parties themselves, it is no defense to proceeding seeking to set up special claim on property that some of the materials were not in fact so used and applied. 22 App. 195 (1) (95 S. E. 762).

Notice: Conveyance of property to purchaser with actual notice of contrac-

tor's claim of lien, after contractor's lien attaches by a beginning of performance under the contract, does not affect right of lien for the whole, though part of execution of contract is before and part after time of conveyance. 149/787 (102 S. E. 528).

Subsequent purchaser with actual notice of claim of lien takes subject thereto, and lien is therefore properly recorded against original owner, and foreclosure proceeding properly brought against him. *Id.*

Title: Want of title in defendant to premises upon which lien is claimed, and alleged title in third person, will not bar action to foreclose and enforce materialman's lien; if defendant has any interest in the premises upon which lien can take effect that interest is bound. 140/593 (1) (79 S. E. 465).

Waiver: Contract between materialmen and contractor that former would not allow any lien for material and would save contractor harmless against demands or suits therefor did not waive lien. 142/499, 500 (4) (83 S. E. 210).

 Liens other than mortgages.

2.

Assent: Holder of security deed agreeing to contract for improvement of real estate is proper party to foreclosure of lien, and lien binds his interest in property. 13 App. 42 (1) (78 S. E. 869).

Owner of real estate in exclusive possession of property, where she resided with her son, who had full knowledge that her son was having a garage erected thereon, and who entered no objections to making of the improvement, which inured to her benefit, and it appearing that the son acted as her agent, property was subject to lien for materials used in such garage. 20 App. 349 (1) (93 S. E. 154).

Contract: There is sufficient privity between mechanic, employed by contractor, and owner to support mechanic's lien. 141/644 (1) (81 S. E. 849).

Estoppel: Where materialman, on being notified by owner that contractor requested payment, authorized her to pay contractor, he was estopped from asserting his lien to extent of sum so paid. 141/806 (82 S. E. 232).

Lessee here held to have an estate for years in leased premises, to which materialman's lien could attach and be enforced against, subject to conditions of lease. 140/593 (4) (79 S. E. 465).

Where lease of wharf to railroad by steamship company was renewed with agreement for adjustment as to improvements erected by lessee, materialmen furnishing lumber to contractor, which was used in improvement by railroad company, the lessor reimbursing the railroad company, was not entitled to a lien on the improved property. 142/186 (1) (82 S. E. 532).

Fact that railroad owned most of stock of steamship company did not make the two corporations identical, so as to render property of steamship company that of the railroad. *Id.* 186 (2).

Payments by owner which are not applied to claims for labor or material will not affect liens of subcontractors who have furnished material. 142/499, 500 (3) (83 S. E. 210).

Where owner of real estate, upon which improvements have been erected

by contractor, has paid full price, and contractor has applied whole amount received to payment of valid claims for material and labor employed in such improvements, owner will be protected against claims of lien for material furnished to contractor, filed subsequently to payment and application of full contract price. 146/19 (1) (90 S. E. 473).

Where there was no objection to plea that plaintiff was not entitled to lien or to the evidence, which showed without conflict that contractor, who had received entire contract price, had paid it all out in satisfying claims for liens and material, verdict was properly directed for defendant owner. 146/19 (2) (90 S. E. 473).

Pleading: Petition failing to allege that after notice of buyer's failure to comply with contract the vendor elected to treat the transaction as complete sale by filing materialman's lien was demurrable. 142/308 (2) (82 S. E. 887).

Separate properties: Where materials are furnished for improvement of two distinct pieces of property under a single contract with the owner, lien attaches to both pieces of property. 13 App. 450 (1) (79 S. E. 236).

Subcontractor: Mechanic furnishing material and doing work on employment of subcontractor does not acquire lien against property improved. 143/840 (2) (85 S. E. 1018).

Evidence here in suit to foreclose mechanic's lien showed that plaintiff furnished material and did work on employment of subcontractor. *Id.*

Surety: Obligation of contractor's bond here was sufficiently broad to guarantee construction of building according to contract, and to render surety liable for any amount which owner was required to pay materialmen. 142/499, 501 (7) (83 S. E. 210).

Sworn statement: This section contemplates the production of only one sworn statement by contractor after completion of work and before final settlement, and where owner disregards statute and contracts to pay for improvements pending construction, fact that he takes sworn state-

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ment after each payment will not protect him from liens. 142/499, 500 (2) (83 S. E. 210).

Fact that owner failed to take sworn statement of contractor is no defense for surety in suit for breach of contractor's bond, where bond contained no stipulation that such an affidavit should be taken. 20 App. 497 (1) (93 S. E. 112).

3.

Cited. 142/499, 508 (83 S. E. 210).

General Note.

Cited. 142/590 (83 S. E. 239).

§ 3353. (§ 2804.) Mechanics' liens, how declared and created.

1.

Time: In absence of express stipulation to contrary, lien of builder and materialman arising under an entire

2.

Amendment: Petition under this section was amendable to show, in conformity with contract relied on, that such contract was entered into by both defendants and not merely by one as stated in petition; petition as amended here was not demurrable. 15 App. 239 (2, 3) (82 S. E. 936).

Charge: Where court fairly submitted question as to whether plaintiff had transferred to another his contract with defendant, although it appeared that evidence for defendant might not have been such as to require submission of such an issue, it was not error to charge that if plaintiff was entitled to recover, he would be entitled to the lien as claimed. 20 App. 431, 432 (4) (93 S. E. 109).

Description: Fact that claim of lien did not specify particular portion of road upon which work was done, or date on which work was completed, did not render it invalid. 20 App. 431, 432 (2) (93 S. E. 109).

Filing: Mere filing of claim of lien is insufficient; such claim must be recorded. 21 App. 464 (94 S. E. 636).

2 (a).

Bankruptcy: Lien of judgment on unsecured claim of creditor, within four

True owner, as used in this section, include owner of leasehold estate, and liens provided for may attach to interest of lessee who has an estate for years, subject to conditions of lease. 140/593 (3) (79 S. E. 465).

Waiver: Seller who institutes bail trover is estopped to foreclose materialman's liens. 142/308 (1) (82 S. E. 887).

contract can not be foreclosed until the completion of the contract. 13 App. 847 (1) (81 S. E. 263).

Petition: Where petition fails to allege that lien was recorded within three months after completion of work, it is demurrable. 16 App. 788 (86 S. E. 411).

Claim of lien, as recorded, seeking to set up under one claim amounts due under two contracts relative to same general undertaking, where lien for each was authorized by statute, did not render petition subject to demurrer, where it was therein declared what part had been due under each of the contracts, and what amount was then claimed under the latter agreement. 20 App. 431 (1) (93 S. E. 109).

Recording: Official duty of clerk of superior court to record with reasonable promptitude materialman's claim of lien. 141/808 (1) (82 S. E. 280).

Separate properties: Where materials are furnished for improvement of two distinct pieces of property under a single contract with the owner, the lien attaches to both properties, and it is immaterial for which piece the last item of material was furnished. 13 App. 450 (1) (79 S. E. 236).

months prior to filing of bankruptcy proceeding by or against his debtor,

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becomes, under section 67f of the Bankruptcy Act of 1898, null and void if debtor be duly adjudicated a bankrupt; and, in that event, invalidity of such judgment lien relates back to time judgment was entered. 20 App. 491 (2) (93 S. E. 116, 40 A. B. Rep. 25).

Where contractor is discharged in bankruptcy prior to judgment creating lien, and his liability is thereby annulled, lien can not be foreclosed against property of owner and judgment be rendered against him. 20 App. 491 (2-a) (93 S. E. 116, 40 A. B. Rep. 25).

Contractor: There can be no valid judgment of foreclosure of lien for materials furnished contractor, in absence of valid judgment for plaintiff against contractor. 144/840 (2) (88 S. E. 201).

In order that there may be valid judgment of foreclosure of lien for materials furnished to contractor, upon real estate improved, must be valid judgment in personam for materialman against contractor, rendered in independent suit against contractor or concurrently in foreclosure suit where contractor and owner of land are both made parties and duly served. 145/621 (1) (89 S. E. 751).

In order to foreclose materialman's lien for material furnished contractor, to be used in improving property of another, it is necessary that materialman have judgment against contractor in a previous action, or contractor must be sued in foreclosure proceeding concurrently with owner of property improved. 18 App. 37 (1) (88 S. E. 795).

Excess: If one's claim exceed his right, excess of claim is void, but not the whole claim; valid part may be legally asserted, though invalid part fail. 147/36 (2-b) (92 S. E. 755).

Joinder: Materialman who has furnished articles to contractor for improvement of real estate of another may concurrently sue contractor and the owner. 18 App. 395 (1) (89 S. E. 442).

Judgment: Materialman is not entitled to personal judgment against owner for value of material furnished to contractor. 143/699 (1) (85 S. E. 832); 144/840 (1) (88 S. E. 201).

While lien of materialman is not complete until judgment thereon is obtained, after rendition of judgment lien dates from time of filing. 147/36 (2) (92 S. E. 755).

Materialman who has furnished articles to contractor for improvement of real estate of another can not maintain separate action at law against land owner, until he has first obtained judgment against contractor. 18 App. 395 (1) (89 S. E. 442).

Valid judgment in personam in favor of materialman rendered in independent suit against contractor or concurrently in foreclosure suit where contractor and owner of land are made parties and duly served is condition precedent to valid judgment of foreclosure of materialman's lien for materials furnished to contractor. 20 App. 480 (93 S. E. 122), 491 (1) (93 S. E. 116).

Jurisdiction: City courts have jurisdiction to render judgment foreclosing materialman's lien on real estate. 13 App. 42 (2) (78 S. E. 869).

Justice's court has no jurisdiction to foreclose lien on real estate for work done or for material furnished in improvement of same. 19 App. 488 (1) (91 S. E. 908).

Partition of land on which lien of materialman has been filed can not defeat lien where all statutory requirements are complied with, though judgment is obtained after partition. 147/36 (2-a) (92 S. E. 755).

Petition: Where owner of real estate is sued in justice's court for price of material used by defendant in improvement of property, and in same suit plaintiff claims lien on real estate and prays for both general judgment against defendant and special judgment against property, that part of petition which relates to lien will be regarded as surplusage. 19 App. 488 (2) (91 S. E. 908).

Record: Where materialman's lien is filed within 12 months, but superior court clerk negligently fails to record same within 12 months, materialman need not show, before recovering his damages from clerk and sureties, that he has unsuccessfully prosecuted foreclosure proceeding. 141/808 (2) (82 S. E. 280).

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Title: Want of title in defendant to premises on which lien is claimed, and alleged title in third person not party to suit, will not bar action to fore-
3.

Bona fide purchaser of absolute title or real estate, who bought without notice of materialman's lien upon same, which at time of purchase had been neither recorded nor foreclosed, took property divested of such lien. 147/209 (2) (93 S. E. 201).

Notice: Conveyance of property to purchaser with actual notice of contractor's claim of lien, after contractor's lien attaches by a beginning of performance under the contract, does not affect right of lien for the whole, though part of execution of contract is before and part after time of conveyance. 149/787 (102 S. E. 528).

Subsequent purchaser with actual notice of claim of lien takes subject thereto, and lien is therefore properly recorded against original owner, and foreclosure proceeding properly brought against him. *Id.*

Security deed: In contest between materialman's lien which was recorded within prescribed time, and security deed executed by common debtor after material was furnished, but before record of lien, where it affirmatively appears that security deed was upon valuable consideration, and there is

close and enforce statutory lien of materialman. 18 App. 395 (4) (89 S. E. 442).

nothing to show actual knowledge to grantee, or knowledge of any fact sufficient to put him upon inquiry as to existence of lien, presumption arises that grantee is purchaser without notice. 148/275 (1) (96 S. E. 566).

Where title to real estate is conveyed by duly recorded deed to secure debt, and grantee takes deed and advances money loaned without knowledge or notice of materialman's lien and before its record, title thus acquired is superior to such lien. 148/275, 276 (2) (96 S. E. 566).

Trust deed: Lien of contractor on real estate improved under contract with owner, as provided by section 3352, if and when "created and declared," as required by this section, attaches from time work is commenced, and takes priority over title acquired, with actual notice of contractor's claim of lien, by subsequent grantee in trust deed from owner of real estate, although deed was executed and recorded before completion of contract and before claim of lien was recorded and before commencement of action to recover amount of claim. 149/787 (102 S. E. 528).

General Note.

Cited. 142/590 (83 S. E. 239).

§ 3354. (§ 2805.) **Mechanic's lien on personalty.**

Employee: Firm operating repair shop has lien on property repaired, though work is done by its employees. 143/547 (85 S. E. 856).

Nonsuit properly awarded in action of trover for automobile retained by defendant for purpose of asserting his lien as a mechanic, where plaintiff denied that entire charge made by defendant was correct, but admitted that he had authorized certain part of the work to be done, which was of stated value, and that he had not paid or offered to pay this amount before instituting suit, and thus discharged lien of defendant for amount confessedly due. 21 App. 94 (94 S. E. 75).

Record: Failure to record claim of lien for labor done or material furnished in repairing personal property, within ten days, is fatal to maintenance of lien, where possession of property is surrendered to bailor. 13 App. 450 (1) (79 S. E. 355).

Sawmill proprietors: Lien provided for in section 3356 must be asserted in manner prescribed in this section. 13 App. 496 (1) (79 S. E. 362).

Waiver: Persons having right to lien on personal property for repairs waived such lien by agreeing to balance accounts from time to time with the person for whom repairs were made. 13 App. 450 (2) (79 S. E. 355).

Liens other than mortgages.

§ 3356. (§ 2807.) **Liens in favor of planing-mills, etc.**

Record: Where possession of property upon which sawmill proprietor's lien is claimed has been surrendered to the debtor, the lien is lost, unless claim is recorded within ten days after work

is done. 13 App. 496 (1) (79 S. E. 362).

Sawmill proprietor: Lien must be asserted in manner prescribed in section 3354. 13 App. 496 (1) (79 S. E. 362).

§ 3358. (§ 2809.) **Liens for articles furnished to sawmills.**

Mules: Lien does not extend to mules used in hauling timber. 17 App. 40, 41 (2) (86 S. E. 257).

Where plaintiff improperly levied upon mules he is liable for costs of lien execution incurred in keeping such mules. Id. 40, 41 (5).

Standing timber: Lien applies to timber or logs severed from the soil, not to standing trees, although sold to pur-

chaser to be severed from soil and converted into lumber for his sawmill. 13 App. 509 (1) (79 S. E. 383).

Validity: Where execution has been issued and counter-affidavit filed and claim interposed to levy, claimant may attack validity of lien claimed, although defendant may have withdrawn his counter-affidavit before trial. 13 App. 509 (2) (79 S. E. 383).

§ 3361. (§ 2811.) **Liens on get of stallions, etc.**

Title: Owner of stallion or jack is not entitled to the get thereof but merely to lien which does not be-

come operative until this section has been complied with. 17 App. 505 (2) (87 S. E. 718).

§ 3364. (§ 2814.) **Lien of attorneys at law.**

2.

Alimony: Application for alimony not within this section. 140/18, 25 (78 S. E. 462).

"Amount due," as here used, does not include alimony or counsel fees. 140/18, 25 (78 S. E. 462).

Counsel fees: Application for counsel fees in divorce suit not within this section. 140/18, 25 (78 S. E. 462).

"Money," as here used, does not include alimony or counsel fees. 140/18, 25 (78 S. E. 462).

Notice: Lien can not be disregarded by debtor who has notice of the lien, either before or after judgment. 13 App. 259, 264 (79 S. E. 82).

Settlement: Attorney who instituted action for clients as payees against maker of note may prosecute original suit to recover his fees where it was settled out of court without his authority. 144/14 (2) (85 S. E. 1049).

Attorney for defendant has lien upon defendant's interest in pending suit for his contingent fee, which can not be defeated by any settlement made without his consent, after filing of suit. 13 App. 326 (79 S. E. 81).

Where defendant settles with plaintiff without consent of plaintiff's attorney, such attorney may continue action for purpose of asserting his lien and recovering his fees, but before he can get recovery in such case, he must introduce such proof as would be required if action were proceeding for benefit of his client. 24 App. 727, 729 (4) (102 S. E. 192).

Mere fact that defendant in settlement without consent of plaintiff's attorney pays less than full amount, after suit is instituted, is at most an admission in the nature of a compromise, and would not prove that any liability in fact existed. 24 App. 727, 729 (4) (102 S. E. 192).

3.

Administrator: Attorney's suit to enforce lien for services in partition suit to client since deceased, should have

been dismissed, where it was brought against heirs of deceased and third person instead of against adminis*ra-

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tor of deceased. 144/517 (87 S. E. 655).

Mortgage: Where fund derived from receiver's sale of mortgaged crops in suit against mortgagor, wherein mortgagees intervened, was insufficient to satisfy mortgages, mortgagor's attorney in litigation was not entitled to any lien on such fund, though his services may have been beneficial to his client. 141/564 (81 S. E. 880).

Quantum meruit: Where attorneys filed claim of lien on land recovered in a suit, reciting special contract for

undivided interest on recovery thereof, and also special contract for specified interest as a conditional fee, which allegation was supported by evidence, there was no error in failing to authorize recovery on quantum meruit. 142/168 (1) (82 S. E. 544).

Receivers: Attorney for plaintiff in equitable suit, wherein receiver was appointed, whose fee was to be paid out of property recovered for his client, had superior lien on fund after costs of proceeding and taxes. 147/158 (3) (93 S. E. 86).

ARTICLE 2.

Foreclosure of Liens on Real Estate.

§ 3365. (§ 2518.) Enforcement of liens on realty.

1.

Attorney's lien: Attorney's suit to enforce lien for services in partition suit to client since deceased, should have been dismissed, where it was brought against heirs of deceased and third person instead of against administrator of deceased. 144/517 (87 S. E. 655).

Condition precedent: Fact that building was incomplete when suit was filed to enjoin foreclosure of mechanic's lien and require lienors to intervene and set up their claims was no reason why materialman's lien could not be foreclosed in that suit. 142/499, 500 (6) (83 S. E. 210).

Jurisdiction: Justice court has no jurisdiction of suit to foreclose lien on real estate for work done or material furnished in improving same. 142/590 (83 S. E. 239); 15 App. 369 (83 S. E. 448); 19 App. 488 (1) (91 S. E. 908).

Laborer's lien: Petition to foreclose mechanic's lien for labor performed under employment of contractor engaged by agent of owner was not demurrable for failure to allege that person designated as true owner made contract. 141/644 (3) (81 S. E. 849).

Petition to foreclose lien of mechanic for labor performed under employment of contractor by plaintiff and liens of other mechanics duly assigned to him, was not demurrable

for failure to allege that plaintiff was holder of any valid lien against property for labor performed by such other persons. Id. 644 (4).

Petition was not demurrable on ground that it did not allege when labor was performed and when claims of lien were filed. Id. 644 (5).

Where petition alleged that plaintiff had recovered judgment in justice's court against contractor for amount of his lien claims, it was not demurrable for failure to attach copy of such judgment or to set out any judgment against contractor or to show that any valid judgment had been rendered against him by court of competent jurisdiction. Id. 644, 645 (6).

Where petition in suit against true owner and his alleged agent did not allege any indebtedness authorizing personal judgment, but alleged facts authorizing lien claimed, petition was demurrable as to agent, but should have been retained as to owner to foreclose lien. Id. 644, 645 (7).

Materialmen: Petition failing to set forth bill of particulars of itemized account of materials furnished, or when the lien was filed, not setting forth or describing judgment obtained against contractor or court in which

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it was rendered, was demurrable. 141/682 (2) (81 S. E. 1119).

Allegation that on certain date plaintiff, in consideration of stated sum to be paid by contractor, contracted with latter for materials furnished and put up by contractor upon real estate, was good as against demurrer that petition did not allege value of materials. Id. 682 (2).

Allegation that materials were put up by contractor on real estate under his contract to construct building, was sufficient allegation that materials were

used in improvement of property. Id. 682 (2).

Parties: Necessary that materialmen should make contractor party defendant, or should have previously obtained judgment against him. 142/499, 500 (5) (83 S. E. 210).

Process: Foreclosure can not be defeated because non-resident contractor has not been personally served, especially where surety on contractor's bond is party to proceeding. 142/499, 500 (5) (83 S. E. 210).

3.

Proceeds of sale: As general rule, residue of funds produced at execution sale, after payment of costs, is to be

applied on lines divested by sale, in their relative priority. 145/224 (1) (88 S. E. 941).

General Note.

Common law: Fact that cropper has laborer's lien on crops raised by him and is entitled to foreclose it does not prevent him from suing his landlord for amount of indebtedness due under his contract; remedy given by

sections 3334, 3365, and 3366 is not exclusive, and does not deprive laborer of his common-law right to sue upon a contract, but is merely cumulative of that right. 19 App. 79 (1) (90 S. E. 1039).

ARTICLE 3.

Foreclosure of Liens on Personal Property.

§ 3366. (§ 2816.) Enforcement of liens on personalty.

1.

Demand: It was not incumbent upon plaintiff to show that she had made demand upon her employer for her part of the crop illegally held from her, where employer, by his conduct, had, if not expressly, at least impliedly, waived such demand. 18 App. 449 (2) (89 S. E. 603).

It was not necessary for plaintiff in suit on an indebtedness here arising under a lease contract and to foreclose special lien to make demand on defendant before bringing suit. 22 App. 480 (2) (96 S. E. 351).

2.

Cited. 22 App. 79, 81 (95 S. E. 375). **Installments:** It was not necessary that suit on indebtedness here arising under a lease contract and to foreclose special lien be brought within twelve months after maturity of the last installment

of indebtedness. 22 App. 480 (2) (96 S. E. 351).

Landlord: This section does not apply to landlord's enforcement, by distress warrant, of claim for rent. 16 App. 345 (85 S. E. 356).

3.

Agent: Upon foreclosure of landlord's special lien for supplies, although affi-

davit made to secure issuance of execution therein may be made by agent

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of landlord, yet when it appears that affidavit is made by such an agent, execution should issue in favor of principal; where execution issued in favor of D., agent for M., it was in favor of D. individually, and words "agent for M." were merely *descriptio personae*, and motion of defendant to dismiss proceeding against him on such ground should have been granted. 20 App. 138 (1) (92 S. E. 763).

4.

Cited. 16 App. 345, 348 (85 S. E. 356).

Dismissal of levy upon personalty of defendant after foreclosure of liveryman's lien was proper, where it appeared, from answer of judge of municipal court on certiorari that plaintiff acquiesced in and consented to the dismissal. 20 App. 801 (93 S. E. 513).

6.

Counter-affidavit: Giving of replevy bond does not convert foreclosure proceeding into mesne process; it requires counter-affidavit to do this, and no such affidavit having been filed at proper time here, court did not err, on motion of plaintiff's counsel, in entering up judgment on bond against defendant and sureties. 22 App. 451 (1) (96 S. E. 395).

Until counter-affidavit is made and filed with proper officer and at proper time, there is no suit or case to return for trial. 22 App. 451 (2) (96 S. E. 395).

Completion: Ordinarily, before laborer's lien can be foreclosed, it must be shown that laborer has fully completed contract; however, if completion of contract was waived or prevented by other party thereto, this is equivalent to completion of same, as a remedial element. 18 App. 449 (1) (89 S. E. 603).

Levy: Where levy was made upon certain personalty as property of defendant after foreclosure of liveryman's lien, so much of judgment as awarded fund to claimant was error, where it appeared that no evidence whatever was introduced, and that levy was dismissed upon purely technical ground. 20 App. 801 (93 S. E. 513).

Presumption: In absence of anything to contrary, presumed that counter-affidavits contesting amount and justice of lien claimed under section 3358, were filed in accordance with this section. 17 App. 40, 41 (3) (86 S. E. 257).

Verdict: Where jury find in favor of plaintiff, on trial of issue made by counter-affidavit on foreclosure of laborer's lien, verdict must be for fixed sum of money or amount of finding must be ascertainable from record. 22 App. 763 (1) (97 S. E. 205).

General Note.

Common law: Fact that cropper has laborer's lien on crops raised by him and is entitled to foreclose it does not prevent him from suing his landlord for amount of indebtedness due under his contract; remedy given by sec-

tions 3334, 3365, and 3366 is not exclusive, and does not deprive laborer of his common-law right to sue upon a contract, but is merely cumulative of that right. 19 App. 79 (1) (90 S. E. 1039).

§ 3367. (§ 2817.) Judgment on replevy bonds, in lien cases.

Counter-affidavit: In absence of counter-affidavit, plaintiffs here were authorized, under this section, to enter up judgment on replevy bond, against

defendant and his surety, in the same manner as in cases of appeal. 21 App. 593 (94 S. E. 815).

 Miscellaneous provisions.

ARTICLE 4.

Miscellaneous Provisions.**§ 3372. (§ 2822.) Liens are assignable.**

Statutory liens: Liens created by statute not merely declaratory of the common law, and which are not dependent for their existence on possession of property to which they attach, are generally assignable. 21 App. 535, 536 (3) (94 S. E. 863).

Writing: Where mechanic performs labor under employment of contractor, and causes lien to be duly filed and recorded, claim of lien may be assigned in writing. 141/644 (2) (81 S. E. 849).

Lien created by statute may be assigned by landlord in writing, and not otherwise, and under such assignment the assignee shall have all the rights of the landlord; this is true whether rent contract between landlord and tenant be in writing or not, if relation of landlord and tenant exists at time of execution of written assignment by landlord. 21 App. 535, 536 (4) (94 S. E. 863).

§ 3375. (§ 2825.) Lien by by-laws.

Bank: Lien created by by-law of bank was valid and binding against the bank stock, and against the proceeds thereof in the hands of administrators of the owner thereof. 20 App. 1, 6 (1) (92 S. E. 778).

Defendant bank was under no duty to transfer to plaintiff share of defendant's capital stock described in instrument executed by original order as security for a debt to plaintiff, and subsequently purchased by plaintiff at a sale under that instrument, although the instrument was recorded before the maker became indebted to defendant bank. 22 App. 688 (97 S. E. 107).

Where certificate of bank stock makes no reference to existence of a lien, transferee of such stock is not affected by terms of by-law lien of which he has no notice. 24 App. 435 (2) (101 S. E. 203).

By-law: Where none is provided by statute or charter or by-laws, a corporation has no lien on its shares as against the holders thereof. 149/280 (1) (99 S. E. 851).

Notice: Where one extends credit on faith of shares of stock pledged as security, without notice of by-law lien in favor of corporation issuing stock, and pledgee obtains general judgment against pledgor, and execution is issued on stock, and at sheriff's sale pledgee buys stock, contract lien is superior to by-law lien, and corporation can not refuse to transfer stock to such purchaser, notwithstanding notice of by-law lien was given to purchaser at time of sheriff's sale; pledgee's lien dates from execution of contract, and not from date of judgment. 147/750 (95 S. E. 286).

Transfer: Where a person purchases bona fide and for value and has transferred to him certificates of stock, he is protected as such innocent holder in a suit against him by the corporation seeking to cancel such shares on account of indebtedness for unpaid subscriptions due the corporation by his transferors. 149/280 (2) (99 S. E. 851).

Homestead; exemptions; in what, and to whom granted.

CHAPTER 11.**Homestead.**

ARTICLE 1.**Exemptions.**

SECTION 1.**In What, and to Whom Granted.****§ 3377. (§ 2827.) What is exempt, and who may claim it.**

Alimony: Land of aged and infirm person legally set apart to him as homestead is not subject to levy and sale under execution issued upon general judgment for permanent alimony, rendered subsequently to setting apart of homestead. 148/253 (96 S. E. 337).

Automobile: Homestead exemption covering Ford automobile can only be allowed under this section, and can not be upheld as a statutory or "short" homestead under section 3416. 19 App. 13 (1) (90 S. E. 976).

Bankruptcy: Property exempted in bankruptcy court, but which bankrupt did not have set aside by State court as exempt, was subject to *fi. fa.* levied on it more than three years after adjudication in bankruptcy, where no discharge had been granted to bankrupt. 143/734 (85 S. E. 875).

Homestead exemption, set apart by court of bankruptcy, can not be levied on. 16 App. 742, 743 (4) (85 S. E. 791).

Bankrupt, who turned over certain checks and money to pressing creditors without scheduling them and permitted his wife to use small checks for necessities will be denied his exemption. 229 Fed. 825; s. c. 36 A. B. Rep. 358.

Ruling of referee, on objection to allowance of homestead exemption, that bankrupt had concealed property in violation of sections 3377 and 3380, is not in view of section 3386, *res adjudicata* against bankrupt's right to discharge. 252 Fed. 199 (2); s. c. 42 A. B. Rep. 275.

Discharge in bankruptcy under the bankruptcy act of 1898 as amended does not affect lien of general judgment nor lien of mortgage obtained more than four months prior to filing of petition in bankruptcy, relatively to property set aside as exempt under the bankrupt's claim of homestead exemption, although holders of such liens may have proved their claims in bankruptcy. 148/380 (1) (96 S. E. 1004, 42 A. B. Rep. 328).

Where, in voluntary petition in bankruptcy, claim is made for statutory homestead exemption of money from the general estate of bankrupt, court of bankruptcy has jurisdiction to order sale of land upon which lien exists, divested of liens, and to provide that liens shall attach to proceeds of sale; where part of proceeds is set apart for bankrupt under his claim, liens against which right of exemption had been waived will follow such fund. 148/380 (2) (96 S. E. 1004, 42 A. B. Rep. 328).

Collateral attack on judgment setting aside constitutional homestead is not allowable, though allowable as a "short homestead." 19 App. 13 (2) (90 S. E. 976).

Deceased debtor: On death of father prior to adoption of Constitution of 1868, leaving widow and children, his land vested in them as tenants in common, and any action of ordinary in 1869 in setting apart interest of children as homestead was void. 144/497, 498 (5) (87 S. E. 665).

Homestead; exemptions; in what, and to whom granted.

Estoppel: Wife and children for whose benefit homestead was set apart, and who have enjoyed the benefit for years can not, after death of husband and father, attack its validity because of formal defects in application or in judgment setting apart the homestead. 13 App. 268 (2) (79 S. E. 160).

Beneficiaries of homestead who executed mortgage to homestead property, and who did not set up homestead as defense to proceedings to foreclose mortgage, are not estopped from setting up homestead against purchaser at foreclosure sale, in action of ejectment brought by purchaser against beneficiaries who remained in possession of homestead property; nor are they estopped on account of any partition proceedings between plaintiff and beneficiaries, as a result of which homestead property or some part thereof was awarded to plaintiff. 147/335 (5) 94 S. E. 465).

Injunction: Equitable petition to restrain interference with homestead here was subject to special demurrer on ground that description of property was too indefinite. 143/385 (1) (85 S. E. 95).

It was error to admit in evidence void proceedings on application for homestead. *Id.* 385 (2).

Judgment: Purchaser at sheriff's sale of land burdened with homestead takes property subject to homestead; but if there is no judgment of ordinary setting apart the homestead, there is no homestead, and such purchaser secures good title. 146/63 (2) (90 S. E. 383).

Landlord and tenant: Landlord's rent lien on crops raised on rented premises is in nature of purchase money, and is superior to homestead exemption set apart out of the crops. 23 App. 640 (1) (99 S. E. 140).

Mortgage: Where under Constitution of 1868 homestead was set apart in land of husband as head of family, it can not be mortgaged for any purpose, since adoption of Constitution of 1877, by wife or any beneficiary of homestead, nor can any beneficiary convey title to such homestead property. 147/335 (3) (94 S. E. 465).

Ejectment will not lie against beneficiaries of homestead property, to re-

cover its possession, although plaintiff has deed of conveyance from certain of beneficiaries to property, and deed from sheriff who sold property under mortgage *fi. fa.* based on mortgage to homestead property, executed by other beneficiaries of homestead. 147/335 (6) (94 S. E. 465).

Plaintiff in bail trover against purchaser of horse at foreclosure of chattel mortgage made by third party, who showed defendant's possession, his refusal to deliver after demand, its value, and that it belonged to her under homestead taken out by her husband, and was purchased with proceeds of homestead, and sold by constable after notice that it was homestead property, should not have been nonsuited. 24 App. 92 (100 S. E. 41).

Purchase money and debts incurred in removing incumbrances have same status. 146/475 (3) (91 S. E. 550).

Where seller of personal property brings trover against one not original purchaser, to recover property or its value, money judgment therein is not a judgment for purchase money. 148/770 (2) (98 S. E. 270, 43 A. B. Rep. 125).

Sale: One buying real estate in ignorance of its homestead character, may set up fact that no order of court was obtained for the sale, as defense on note given him; this is true especially when homestead property is still in possession of vendors. 13 App. 268 (4) (79 S. E. 160).

Homestead property is exempt from levy and sale, and can not be sold by virtue of any process whatever under laws of State, except as provided by law. 147/335 (2) (94 S. E. 465).

Scope: Homestead exemption does not apply as against taxes or debts for purchase money of property, for labor done thereon, for material furnished therefor, or for removal of incumbrances thereon. 146/475 (3) (91 S. E. 550).

Title to land in this State is not changed when set apart as homestead for use of beneficiaries; only the use of the property is thus changed, and it can not be alienated, except for reinvestment as provided by law, and except also that head of family may convey his reversionary interest in the land,

Application and schedule.

where homestead was set apart under Constitution of 1868. 147/335 (1) (94 S. E. 465).

Even purchaser in good faith of homestead property which is sold under judicial process (mortgage *fi. fa.*), and which is not subject to sale under exceptions provided by law, acquires no title thereto. 147/335 (4) (94 S. E. 465).

Usury: Where borrowed money was used to pay for land, and in virtue of such payment borrower received deed, and subsequently obtained homestead covering the land, lender was entitled to amount of his principal, with lawful interest, in preference to homestead of debtor, though lender may have charged usury. 146/475 (3-a) (91 S. E. 550).

SECTION 2.

Application and Schedule.

§ 3378. (§ 2828.) **Application, how made.**

1.

Domicile: Allegation in application for homestead in behalf of applicant and minor children that she is resident of county in which application is filed, and that her husband, who is resident of county, refuses to apply, are

sufficient to give ordinary jurisdiction. 19 App. 13 (5) (90 S. E. 976).

Property: Sufficiency of identification of property in application for homestead is matter for jury. 19 App. 13 (4) (90 S. E. 976).

2.

Automobile: Description of automobile in application for homestead as "one five-passenger Ford automobile" was sufficient to identify property. 19 App. 13 (4) (90 S. E. 976).

Failure: Where claim was interposed by one as head of family as against sale of certain lands under mortgage *fi. fa.*,

documents purporting to constitute homestead proceedings were not material, and were properly rejected, they making no reference to land in question and not containing any plat of the same. 148/113 (1) (95 S. E. 976).

3.

Schedule on application for homestead is part of the pleadings, amendable

at any time prior to judgment. 145/325 (3) (89 S. E. 203).

§ 3380. (§ 2830.) **Schedule must be full; effect of fraudulent omission.**

Bankrupt who conceals personal property, omitting it from his schedule, is not entitled to claim exemption. 224 Fed. 790 (1); *s. c.* 35 A. B. Rep. 487).

Bankrupt, who turned over certain checks and money to pressing creditors without scheduling them and permitted his wife to use small checks for necessities will be denied his exemption. 229 Fed. 825; *s. c.* 36 A. B. Rep. 358.

Schedule and financial statements showing shrinkage of assets made

prima facie case, and, unless explained, raised conclusive presumption of concealment of assets. 230 Fed. 316 (1); *s. c.* 36 A. B. Rep. 367.

Ruling of referee, on objections to allowance of homestead exemption, that bankrupt had concealed property in violation of sections 3377 and 3380, is not, in view of section 3386, res judicata against bankrupt's right to discharge. 252 Fed. 199 (2); *s. c.* 42 A. B. Rep. 275.

Notice to creditors; surveyor's return; approval of plat and application.

SECTION 3.

Notice to Creditors.

§ 3381. (§ 2831.) **Notice of application, how published.**

Misnomer: Where there is misnomer in printed notice, judgment granting homestead is of no force as against creditor. 19 App. 13 (3) (90 S. E. 976).

Scope: Requirement as to notice is intended for benefit of creditors of person out of whose estate homestead is to be set apart, and advertisement would not avail one for whose benefit publi-

cation was not made. 19 App. 13 (3) (90 S. E. 976).

Time to be fixed by notice of when ordinary will act on application for setting apart homestead, is not less than twenty nor more than thirty days from date of order of ordinary to surveyor; if more than thirty days intervenes, homestead is void. 146/490 (1) (91 S. E. 675).

§ 3382. (§ 2832.) **Other notice.**

Time: Where homestead was applied for December 4th, and surveyor's return laying off homestead was made

December 14th, ordinary was without authority to approve it on December 15th. 141/590 (1) (81 S. E. 859).

SECTION 4.

Surveyor's Return; Approval of Plat and Application.

§ 3385. (§ 2835.) **Application for homestead, how approved, etc.**

Approval: Among requisites to constitute valid judgment setting apart homestead, ordinary shall indorse his approval upon schedule of property and upon plat of surveyor. 146/63 (2-a) (90 S. E. 383).

Lis pendens: Doctrine of lis pendens does not apply to pendency of application to set apart homestead, nor to title or rights resting upon void homestead. 146/63 (3) (90 S. E. 383).

Ordinary's order approving or allowing

homestead is necessary in order that proceedings shall constitute setting apart of homestead. 143/385 (2) (85 S. E. 95).

Title: Where approval of homestead by ordinary was void, and sale on execution, after death of applicant for homestead and his wife and arrival at age of minor beneficiaries, was valid, heirs at law of applicant could not recover land from purchaser at execution sale. 141/590 (1) (81 S. E. 859).

§ 3386. (§ 2836.) **Objections, how and when made.**

Bankruptcy: Ruling of referee, on objections to allowance of homestead exemption, that bankrupt has concealed property in violation of sections 3377 and 3380, is not, in view of this section, res judicata against bankrupt's right to discharge. 252 Fed. 199 (2); s. c. 42 A. B. Rep. 275.

Collateral attack: Judgment of ordinary setting apart homestead can not be attacked collaterally for mere irregularities in application, which are amendable and are cured by the judgment. 13 App. 268 (1) (79 S. E. 160).

Rights of wife and children protected; sale, etc.; levy and sale.

SECTION 7.

Rights of Wife and Children, How Protected.

§ 3396. (§ 2846.) Property set apart, how vested.

Children: Where evidence shows that *fi. fa.* is not dormant, and it is levied on land as being that of defendant in *fi. fa.*, his children as claimants can not prevail, because homestead has terminated, where their only title is by virtue of being beneficiaries of homestead with their mother. 147/14 (2) (92 S. E. 647).

Dependent females: Where after head of family had set apart homestead all his children became of age and all married, except daughter, who continued to derive support therefrom, on death of man and his wife homestead terminated. 145/311 (89 S. E. 210).

Direction of verdict declaring that land belonged to head of family and his

wife, with equal interests, error under pleadings and evidence here. 140/134 (2) (78 S. E. 768).

Recover land: Widow suing as sole beneficiary under existing homestead set apart under Constitution of 1868 to her husband, since deceased, may bring action at law for recovery of land and mesne profits; it was erroneous to dismiss petition on ground that action was maintainable only in court of equity. 147/406 (1) (94 S. E. 226).

Sale: Pending existence of homestead set apart to head of family he could not make valid conveyance of land, without order of court. 140/134 (1) (78 S. E. 768).

SECTION 8.

Sale, Reinvestment, and Income.

§ 3398. (§ 2848.) Rents and profits, how disposed of.

Accretions of homestead property are exempt from levy and sale. 19 App. 676 (2) (91 S. E. 1065).

Statutory homestead: This section ap-

plied to statutory or "short" homestead, as well as to constitutional homestead. 19 App. 676 (2-a) (91 S. E. 1065).

SECTION 9.

Levy and Sale, When Allowed.

§ 3400. (§ 2850.) Homestead, how and when sold by officer.

Affidavit: Where *fi. fa.* levied on homestead fails to show lien superior to homestead, and plaintiff in *fi. fa.* does not file affidavit, under this section, levy is illegal. 16 App. 472, 473 (5) (85 S. E. 791).

In order to effect valid levy upon crops raised on rented premises under ordinary distress warrant, it is essential that it first appear that crops were raised on the premises and that affidavit provided for in this section be of file. 23 App. 640 (1-a) (99 S. E. 140).

Failure to file such affidavit is not cured by filing it after levy and interposition of claim to property. *Id.* (1-b).

Illegality: Though exemption of land can not be set up by illegality, it can be asserted by statutory claim. 140/80 (78 S. E. 423).

Verdict: Failure to file affidavit as provided by this section did not vitiate consent verdict and judgment and sale under execution of part of land in controversy. 144/442 (87 S. E. 470).

Waiver of homestead right.

SECTION 11.

Waiver of Homestead Right.

§ 3413. (§ 2863.) Debtor may waive exemption.

Bankruptcy: Not error here to enjoin bankrupt or purchaser from disposing of his exempt property, where plaintiff claimed the property because of waiver of exemption. 142/833, 834 (3) (83 S. E. 943).

Where fund from sale of exempt property which creditors procure to be paid into court is more than sufficient to pay all debts where exemptions were waived, and costs, the excess going to the bankrupt should not be reduced by attorneys' fees for bringing the fund into court. 143/229 (2) (84 S. E. 477).

Where creditors, holding notes containing waiver of exemption, filed petition to subject exemption set apart to bankrupt and taken possession of by receiver and reduced to money, and where other like creditors intervened to procure part of the fund, fee may be allowed therefrom before distribution to attorneys of creditors filing, petition. *Id.*

Where trustee in bankruptcy, depositing bankrupt's money to his own account or his firm's account, paid to bankrupt amount set apart as exempt under this section, as soon as set apart by referee, creditors of bankrupt holding waivers could not compel trustee to redeposit in bankruptcy depository money paid to bankrupt. 214 Fed. 263; s. c. 32 A. B. Rep. 585.

Contract: Written waiver of homestead and exemption is good between parties,

though not shown by an execution issued upon suit based on contract wherein waiver was made, and is provable aliunde, whether lien of judgment be general or special. 22 App. 137 (1) (95 S. E. 718).

Exceptions: Homestead which has been regularly set apart can neither be waived nor renounced by head of family so as to authorize levy upon, and sale of, property so set apart, under execution issued upon judgment against him. 19 App. 676 (1) (91 S. E. 1065).

Note: Where, pending existence of homestead regularly set apart, property be levied upon under execution against head of family and sold, sale is void, and purchaser acquires no title, even though judgment is based upon promissory note stipulating that head of family does solemnly waive and renounce benefit of the homestead. 19 App. 676 (1) (91 S. E. 1065).

Provisions: The word "provisions," as used in sections 3413, 6584, and 6586, does not include hogs. 18 App. 606 (89 S. E. 1095).

Set aside: In order for the exemption provided for by this section to be effectual as against waiver it must have been set apart. 143/229, 230 (4) (84 S. E. 477).

Usury, homestead waiver in contract infected with, void: See catchword **Homestead waiver** under § 3442.

Statutory or short homestead; property exempt from sale.

ARTICLE 2.**Statutory or Short Homestead.**

SECTION 1.**Property Exempt from Sale.****§ 3416. (§ 2866.) Property exempt from sale.**

1.

Description of land as "fifty acres of land, to wit: 21 acres of lot of land No. 72, 6 acres of lot No. —, all in the 19th District, Grady County," was sufficient to validate exemption of land under statutory or short homestead, and to operate in connection with other circumstances here as constructive notice to one who took security deed thereto from head of family after exemption was set apart. 149/654 (101 S. E. 772).

2.

Notice: Where person in possession of property, in 1914, representing same to be free from liens and incumbrances, gave a mortgage on it, he will not be permitted to defeat lien of mortgage by claiming property under homestead granted in 1908, where sole description

Estoppel: Though head of family, at time of execution of security deed, may have represented to grantee that there were no incumbrances on land, this would not affect interests of beneficiaries in the land, nor estop head of family from interposing claim in their behalf when land was levied on under execution based upon judgment on note secured by the deed. 149/654 (101 S. E. 772).

of homestead property was "one mule," unless it be shown that mortgagee had actual notice that the mule, which was fully and particularly described in his mortgage, was same mule referred to in the homestead. 19 App. 797 (1) (92 S. E. 294).

General Note.

Cited. 147/335, 337 (94 S. E. 465).

Automobiles: Homestead exemption covering Ford automobile can only be allowed under section 3377, and can not be upheld as a statutory or "short" homestead under this section. 19 App. 13 (1) (90 S. E. 976).

Collateral attack on judgment setting aside constitutional homestead is not allowable, though allowable as a "short homestead." 19 App. 13 (2) (90 S. E. 976).

Head of family: Where fire insurance company, in its answer to summons of garnishment, admitted indebtedness to defendant as an individual, and not as head of a family, and no traverse was filed, court erred in holding that fund in question, which was amount due on policy issued to defendant in his own name, was not subject to the

garnishment, although insured property had been set apart as an exemption for benefit of defendant's family. 20 App. 204 (92 S. E. 1014).

Schedule of property returned under section 3417 must be of particular property falling within classes specified in this section; schedule which purports to be exemption, wherein no effort is made to specify any particular property as exempt, but setting forth exact copy of this entire section, embracing all various classes of property, is void. 146/260 (1) (91 S. E. 31).

Taxes: Personalty set apart as pony homestead is not subject to levy and sale except for purchase money and taxes. 18 App. 22 (88 S. E. 709).

Title: Setting apart of homestead under constitution does not change or alter title to property; it merely sets apart

Statutory or short homestead; how set apart; effect of exemption.

such property for particular specified use, and to that extent imposes charge or incumbrance upon property, and when husband's title to land failed, specified use to which it was set apart, and trust or charge imposed thereon for benefit of wife, necessarily failed. 147/405, 406 (1) (94 S. E. 244).

Wife for whose benefit husband had set off homestead to himself had no title in land while husband was still in life. 147/405, 406 (2) (94 S. E. 244).

Warehouseman's lien for storage charges on property deposited with him is not superior to exemption rights established by setting it apart as homestead

property, although it be set apart after accrual of storage charges; in such case the warehouseman has only a lien, and not such a property right as will defeat the exemption. 20 App. 149 (92 S. E. 761).

Wife: Property of married woman can not be set apart as exempt from levy and sale on schedule made and filed by her in which she is described as "the head of a family" consisting of herself and her husband and minor children; where husband and wife are living together, the law recognizes the husband as the head of the family. 22 App. 733 (97 S. E. 262).

SECTION 2.

How Set Apart.

§ 3417. (§ 2867.) **Mode of obtaining exemption.**

Description of property should be sufficiently definite to impart notice of property homesteaded. 19 App. 797 (1) (92 S. E. 294).

Property: Schedule of property must be of particular property falling within classes specified in section 3416; schedule which purports to be an exemption, wherein no effort is made to specify any particular property as exempt, but setting forth exact copy of entire section 3416, embracing all various classes of property, is void. 146/260 (1) (91 S. E. 31).

Record: This section does not require ordinary to enter approval of schedule of property filed by debtor, but only to record it in book, kept for that purpose. 145/184 (3) (88 S. E. 949).

Void schedule: Schedule which is void may be disregarded by an officer, and

property therein set forth may be levied upon. 146/260 (2) (91 S. E. 31).

Wife: Property of a husband can not be set apart on a schedule made and filed by the wife, where it does not appear that he refused to make and file a schedule. 22 App. 733 (97 S. E. 262).

Where schedule filed by plaintiff and recorded by ordinary, on which she based her claim to mule which she sought to recover in trover, was void, and the only other evidence as to her ownership of the mule was her husband's testimony that he used some of her money in paying for it, and that they owned it together, court erred in directing verdict for plaintiff. 22 App. 733, 734 (97 S. E. 262).

SECTION 3.

Effect of Exemption.

§ 3423. (§ 2873.) **Short homestead subject to purchase money, etc.**

Scope: Personalty set apart as pony homestead is not subject to levy and sale except for purchase money and taxes. 18 App. 22 (88 S. E. 709).

Warehouseman's lien for storage charges on property deposited with him is not superior to exemption rights established by setting it apart as homestead

Interest and usury; general principles.

property, although it be set apart after accrual of storage charges; in such case the warehouseman has only a lien,

and not such a property right as will defeat the exemption. 20 App. 149 (92 S. E. 761).

CHAPTER 12.

Interest and Usury.

ARTICLE 1.

General Principles.

§ 3426. (§ 2876.) What is lawful interest.

Cited. 17 App. 229, 233 (86 S. E. 456).

Evidence of resolution by bank directors directing cashier to call for loan evidenced by note at once, or secure written agreement from makers and indorsers to pay increased rate of interest, was admissible in action on note. 141/565, 566 (6) (81 S. E. 886).

National bank, exaction of usury by: See § 2280 (s), catchword **National bank**.

Oral agreement: Where makers of note, in consideration of two years' delay in enforcing payment, verbally agreed to pay eight per cent. interest, during the two years, the two per cent. excess could neither be recovered by them nor applied as credit on principal. 141/565, 566 (5) (81 S. E. 886).

Special law: Section 3442 (a) is not invalid on ground that it is a special

law for which provision had been made by this section. 143/530 (1) (85 S. E. 749).

Tax-receiver: Where tax-receiver is paid by county authorities larger amounts than are lawfully due him as commissions, and thereafter fails and refuses to pay back such excess on demand, and execution issues against him and his sureties for the amount or amounts unlawfully retained, the legal rate of seven per cent. per annum should be collected on such amounts. 148/290 (2) (96 S. E. 566).

There is no statute putting tax-receiver on same basis as tax-collector, nor do same reasons exist for exacting penalty of twenty per cent. as in case of defaulting tax-collectors. 148/290 (3) (96 S. E. 566).

§ 3427. (§ 2877.) What is usury.

Burden of proof is upon party pleading usury. 145/580, 581 (4-a) (89 S. E. 740); 22 App. 7 (1) (95 S. E. 313).

Charge: On trial in superior court of action instituted in justice's court to recover usury paid, court should instruct law covering material issues, however defectively such issues were raised by pleadings. 15 App. 811 (2) (84 S. E. 211).

Date: Fact that lender knows that money is borrowed to pay usurious claim to third person does not make loan usurious. 144/852 (1) (88 S. E. 209).

Evidence here sustained findings that transaction was device to cover agree-

ment to pay usurious interest. 15 App. 811 (1) (84 S. E. 211).

On issue between grantor and grantee in security deed, assailed as void because usurious, and in view of other evidence, grantee's testimony that grantor owed him other money, that interest on loan secured by deed was 7 per cent., and on other money 12 per cent., and that no usury was charged on the loan, was admissible. 146/475 (2) (91 S. E. 550).

Testimony of defendant in suit on note, in which usury was pleaded, that he gave bank a note for \$124.00 and on day he gave note borrowed not to exceed \$119.00, and, on being asked on

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cross-examination if he did not borrow as much as \$121.00, answered that he did not, that it was not more than \$119.00, that he did not know how much he got, and that he only made one loan from the bank, was of sufficient certainty to establish fact that sum not exceeding \$119.00 was received by defendant from plaintiff in the loan. 19 App. 701 (91 S. E. 1061).

While a valid written contract may not ordinarily be contradicted or varied by parol, it is competent to show by such evidence that the writing is in fact but a cover for usury penalty, or forfeiture. 22 App. 223, 233 (95 S. E. 724).

Indorser: Concealed usury in note waiving homestead or exemption is available to surety or indorser as defense only when not known to him when he signed instrument. 14 App. 729 (5) (82 S. E. 314).

Intention: To constitute usury it is essential that there be present intent to take or charge higher rate of interest than that allowed by law. 143/302 (84 S. E. 961).

National bank, exaction of usury by: See § 2280 (s), catchword **National bank**.

Old debt: Where lender requires, as condition precedent to loan upon which maximum legal rate of interest has been charged, that borrower discharge and pay off certain obligations due by borrower to lender together with usurious interest thereon, transaction is usurious. 23 App. 458 (1) (98 S. E. 361).

If one who owes debt infected with usury obtains from creditor loan of money at lawful rate of interest, and out of proceeds thereof actually and bona fide pays off old debt with usurious interest, whether at time of obtaining new loan or afterwards, new loan is not thereby usurious; if new transaction as a whole is merely color-

able and used to cover up usury, new loan is usurious. 23 App. 458 (1) (98 S. E. 361).

Profits: Agreement in paper under seal conveying property as security for note to also pay portion of profits of mill did not show attempt to apply profits as additional interest on note. 145/83, 84 (2) (88 S. E. 545).

Special law: Section 3442 (a) is not invalid on ground that it is a special law for which provision had been made by this section. 143/530 (1) (85 S. E. 749).

Surety: Plaintiff in suit against surety has burden, after proof of usury, to show that surety signed note with knowledge of usury. 23 App. 458 (2) (98 S. E. 361).

Surety on note secretly infected with usury, of which he had no knowledge, is discharged from liability if note contains waiver of homestead. 23 App. 458 (2) (98 S. E. 361).

Surety upon note in which there is waiver of homestead is discharged from liability when shown that at time he signed there existed secret agreement between payee and principal whereby latter was to receive and did receive usurious rate of interest. 23 App. 630 (1) (99 S. E. 151).

Tender: Though deed may be void for usury, or transfer of bond for title be void because debt to secure payment of which transfer was made was usurious, these papers will not be cancelled or set aside in an equitable suit, without payment or tender of principal or lawful interest; whoever would have equity must do equity. 146/732 (1) (92 S. E. 52).

Party to deed alleged to be infected with usury can not have same canceled without payment or tender of principal amount of debt and lawful interest. 149/726, 727 (3) (101 S. E. 791).

§ 3428. (§ 2878.) Plea of usury generally personal.

Assignee of bond for title can attack in equity conveyance to one who had advanced money to complete purchase for usury. 143/665, 666 (3) (85 S. E. 840).

Bankruptcy: Defense of usury is available to trustee in bankruptcy of debtor. 17 App. 246 (1) (87 S. E. 694); 19 App. 394 (91 S. E. 490).

Mortgage: Under this section and sec-

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tion 3304 trustee in bankruptcy can set up usury in mortgage, executed by bankrupt, though reduced to judgment. 228 Fed. 551 (2); s. c. 35 A. B. Rep. 841.

§ 3430. (§ 2880.) **Lex loci.**

Intent: Though notes secured by deed to Georgia property were payable in another state, where it appears that the contract was contemplated by the parties to be a Georgia contract, interest laws of Georgia are applicable. 145/580, 581 (3) (89 S. E. 740).

Though notes secured by deed to Georgia property were payable in another state, where it appears that

Stranger: Defense of usury is personal, and can not be taken advantage of by stranger to usurious contract. 148/170 (1) (96 S. E. 211).

the contract was contemplated by the parties to be a Georgia contract, laws of Georgia on usury are applicable. 145/580, 581 (3) (89 S. E. 740).

Oral negotiations: Where bond for title to Georgia land and purchase-money note were executed in Georgia, the usury laws of Georgia apply, though oral negotiations were had in Florida. 143/665 (1) (85 S. E. 840).

§ 3433. (§ 2883.) **Payment, how applied to interest.**

Usury: When not otherwise directed by debtor, payments made on debt infected with usury will be applied first to the payment of the legal interest due at the date of payment, and any balance remaining after such interest is discharged will go in reduction of the principal; plea alleging such payment may be filed although more than twelve months have elapsed since payment. 21 App. 1 (3) (93 S. E. 499).

Although payments made directly as interest will be so regarded, and can not be made use of as set-off or counterclaim under United States Revised Statutes, § 5198, yet where payment is made generally, without direction as to application, it will ordinarily be applied on principal instead of on interest, all right to which was forfeited under that section by agreement for usury. 22 App. 58, 59 (5) (95 S. E. 381).

§ 3434. (§ 2884.) **Interest on liquidated demands.**

Bank: County authorities can not make contract with bank, agreeing to pay interest on warrants, which bank takes up and holds until county treasurer has funds to meet them. 147/599 (95 S. E. 2).

Installments: Stipulation in note that interest shall be paid annually renders interest past due a liquidated demand which itself bears interest. 13 App. 35 (5) (78 S. E. 772).

Insurance: Where policy provided that insurance company would loan insured, at his option, stated amounts of cash, and that loan might be renewed annually, if interest was paid for one year in advance, and insured who had obtained loan died four months after its maturity, without either having renewed or repaid it, company is entitled only to contract rate of interest for actual time of its forbearance. 19 App. 296 (2) (91 S. E. 428). See 22 App. 48 (95 S. E. 379).

Tender: Formal tender of payment of note was in effect waived by statement on part of plaintiff, when defendant offered to pay note, that amount due thereon would not be accepted unless amount due on former note was also paid, and plaintiff could not recover interest from that time on first-mentioned note. 23 App. 356 (3) (98 S. E. 418).

Tender to prevent running of interest must be continuing; using money after refusal by creditor to receive it destroys this necessary attribute of a legal tender. 23 App. 607, 608 (2) (99 S. E. 147).

Verdict: Where demand was unliquidated, allowance of interest was in discretion of jury, and, while they may have increased the damages by allowance of interest, amount so allowed should be included in one gross sum as damages, and not separately specified by verdict. 18 App. 279 (6) (88 S. E. 101).

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§ 3436. (§ 2886.) Beyond eight per cent. interest forbidden.

Stated. 142/84 (1) (82 S. E. 492).
 Cited. 143/302, 303 (84 S. E. 961);
 13 App. 740, 742 (79 S. E. 484); 20
 App. 802, 803, 804 (93 S. E. 538).

Advance: Reserving of interest in advance at highest legal rate constitutes usury. 143/302 (84 S. E. 961).

Reserving of interest in advance at highest legal rate on loan, whether it be short or long term loan, is usurious; and deed to land, given to secure promissory note for loan, is void on account of usury. 146/355 (1) (91 S. E. 120).

Reserving of interest in advance at highest legal rate on a loan, whether it be a short or a long term loan, is usurious. 19 App. 782 (1) (92 S. E. 297).

Where interest on sum loaned is calculated at 8% from date of loan to maturity, and lender then adds amount of such interest to sum lent, and places total amount in note signed by borrower as sum to be repaid, and it is stipulated that such sum shall bear interest at 8% from maturity until paid, the interest has not been reserved in advance, and contract is not usurious. 19 App. 782 (1) (92 S. E. 297).

Commissions: Fact that lender's agent may have charged borrower additional sum for obtaining loan, or for services in perfecting title, would not render transaction usurious as to lender, if he did not authorize charge by agent, had no knowledge thereof, and did not share therein. 142/113 (3) (82 S. E. 442).

Where "brokerage fee," which, if added to stipulated interest, would not make amount exceeding eight per cent. per annum, contract is not usurious. 145/580, 581 (4) (89 S. E. 740).

If agent of lender deducted for himself an amount as commissions of such magnitude as, when added to conventional rate of interest and other charges, would make sum exceeding eight per cent. per annum, but lender did not authorize charge and had no knowledge of it, transaction would not on account thereof be usurious as to the lender. 145/580, 581 (4-a) (89 S. E. 740).

Knowledge of agent procuring loan of charge of "brokerage fee" amounting, together with interest, to more than eight per cent. per annum, will not be imputed to lender. 145/580, 581 (4-b) (89 S. E. 740).

Discount: Where one buys outright negotiable promissory note, transaction is not rendered usurious because discount amounts to more than maximum lawful rate of interest. 23 App. 746 (99 S. E. 319).

To discount, *ex vi termini*, implies a reservation of interest in advance. 251 U. S. 108 (64 L. Ed. 171, 40 Sup. Ct. 58); affirming judgment 21 App. 356 (94 S. E. 611).

Congress did not adopt the prohibition imposed by this section upon taking of interest at highest authorized rate in advance by way of discount, but on the contrary, by section 5197 of the Revised Statutes, specifically authorizes national banks to reserve, on any discount made, interest at the rate allowed by the laws of the several States. 21 App. 356 (2) (94 S. E. 611); judgment affirmed, 251 U. S. 108 (64 L. Ed. 171, 40 Sup. Ct. 58).

Evidence: Rejection of evidence that attorney negotiating loan was agent of lender not cause for reversal, in absence of evidence to show that lender had notice of retention of fees or participated therein. 145/580, 581 (6) (89 S. E. 740).

Where there was evidence to sustain verdict that transaction was a purchase of a note, and not a loan, and that there was therefore no usury, court did not err in overruling motion for new trial. 18 App. 41 (88 S. E. 749).

National bank, exaction of usury by: See § 2280 (s), catchword **National bank**.

Oral agreement: Where makers of note, in consideration of two years' delay in enforcing payment, verbally agreed to pay eight per cent. interest, during the two years, the two per cent. excess could neither be recovered by them nor applied as credit on principal. 141/565, 566 (5) (81 S. E. 886).

Pleading: In order to maintain suit under section 5198 of the Revised

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Statutes of the United States, for recovery of penalty there imposed for charging usury which has been actually paid, such actual payment must be alleged and shown. 21 App. 356 (3) (94 S. E. 611); judgment affirmed, 251 U. S. 108 (64 L. Ed. 171, 40 Sup. Ct. 58).

Where petition in suit to recover usurious payments fails to set out claim sought to be asserted with reasonable degree of distinctness, it is subject to demurrer. 147/43 (2) (92 S. E. 757).

Where suit is instituted to cancel obligation for payment of money as fully paid in so far as it is valid, allegation, taken more strongly against pleader, must clearly show that such payment in full has been made. *Id.* 43 (3).

Rent: If money is loaned to enable borrower to buy certain shop, upon agreement that for use of money lender shall receive from borrower one-half of specified rents from property, which amounts to more than highest legal

rate of interest per annum, transaction is usurious. 146/355 (2) (91 S. E. 120).

Security deed: Conveyance to one as security for money advanced by grantee to purchaser on usurious note is void under this section and section 3442. 143/665 (2) (85 S. E. 840).

Special law: Section 3442 (a) is not invalid on ground that it is a special law for which provision had been made by this section. 143/530 (1) (85 S. E. 749).

Writing off: Prayer in action on note that judgment be declared to be a general judgment against property of defendant as well as against property included in security deed not stricken because alleged contract shows on its face that deed was tainted with usury and void, there being no provision for writing off or remitting unearned interest upon declaring whole debt due for default in paying part, and plaintiff's voluntary action having no such effect upon original contract. 18 App. 242 (1) (89 S. E. 459).

§ 3437. (§ 2887.) Commissions, when not usurious.

Jury: Issue of fact whether intermediaries in loan were agents of borrower or agents of lender should have

been submitted to jury, and direction of verdict for plaintiff was error. 18 App. 242, 243 (4) (89 S. E. 459).

§ 3438. (§ 2888.) Forfeiture. [Any person, company, or corporation violating the provisions of section 3436, shall forfeit the entire interest so charged or taken, or contracted to be reserved, charged or taken.]

Acts 1916, p. 48.

§ 2336.

Act of 1916 was not retroactive; law fixing penalty for usurious charge in note, of force at time of executing note, prevails as against subsequent act repealing such penalty. 148/170 (2) (96 S. E. 211).

Lien of chattel mortgage executed prior to 1916 act as security for loan of money, for use of which interest at rate greater than 5% per month has been reserved or charged, may be asserted for the principal and lawful interest on the debt. 20 App. 802 (2) (93 S. E. 538).

Where chattel mortgage to secure loan of money, for use of which interest at rate greater than 5% per month has been reserved or charged,

has been executed since the 1916 act, lien may be asserted for principal amount actually loaned or advanced. 20 App. 802 (2) (93 S. E. 538).

Even though part of amount of small note represented usury, yet it having been executed prior to amendment of this section charge that, although defendant might not have been surety, but might have been joint obligor of note in suit, charge of interest for which note was given was usurious, so that she would not be liable thereon, whether she was surety or maker of note in suit, was error. 24 App. 613, 615 (5) (101 S. E. 696).

Verdict: Where it appeared from evidence set forth in petition for

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certiorari that verdict complained of included usury, judge of superior court

erred in refusing to sanction the certiorari. 19 App. 217 (91 S. E. 337).

Notes of Decisions under Former Law.

Stated. 142/145 (2) (82 S. E. 562).

Applied. 15 App. 811 (1) (84 S. E. 211).

Nominal principal: Where defendant pleads usury in note, admitting indebtedness in specified sum, and plaintiff admits usury, not error to permit judgment for sum admitted to be due. 14 App. 98 (80 S. E. 213).

Oral agreement: Where makers of note, in consideration of two years' delay in enforcing payment, verbally agreed to pay eight per cent. interest, during the two years, the two per cent. excess could neither be recovered by them nor applied as credit on principal. 141/565, 566 (5) (81 S. E. 886).

§ 3438 (a). **Further penalty.** [No further penalty or forfeiture shall be occasioned, suffered or allowed further than as stipulated in section 3438 (the entire interest).]

Acts 1916, p. 48.

§ 3439. (§ 2889.) **Forfeiture may be pleaded as set-off.**

Applied. 141/105, 106 (1) (80 S. E. 629).

Amendment: Where, in action for money loaned, defendant pleaded merely that, after eliminating usury, the payments extinguished the debt, an amendment adding a set-off for the excess paid as usury did not relate back to the filing of the plea so as to escape the bar of limitations

prescribed by section 3441. 141/105, 106 (2) (80 S. E. 629).

Oral agreement: Where makers of note, in consideration of two years' delay in enforcing payment, verbally agreed to pay eight per cent. interest, during the two years, the two per cent. excess could neither be recovered by them nor applied as credit on principal. 141/565, 566 (5) (81 S. E. 886).

§ 3440. (§ 2890.) **Forfeiture, how discharged.**

Applied. 15 App. 811 (1) (84 S. E. 211).

Pleading: Petition in action to cancel note and conveyance securing the same, because tainted with usury, held not demurrable. 142/84 (3) (82 S. E. 492).

Scope: This section has reference to preceding section touching forfeiture of excess interest charged or taken or contracted to be reserved, charged, or taken under laws of State. 22 App. 58, 65 (95 S. E. 381).

§ 3441. (§ 2891.) **Suit for forfeiture, when barred.**

Stated. 142/609 (2) (83 S. E. 272); 147/43, 44 (4) (92 S. E. 757).

Applied. 141/105, 106 (1) (80 S. E. 629).

Amendment: Where, in action for money loaned, defendant pleaded merely that, after eliminating usury, the payments extinguished the debt, an amendment adding a set-off for the excess paid as usury did not relate back to the filing of the plea so as to escape the bar of limitations prescribed by this section. 141/105, 106 (2) (80 S. E. 629).

Oral agreement: Where makers of note, in consideration of two years' delay in enforcing payment, verbally agreed to pay eight per cent. interest, during the two years, the two per cent. excess could neither be recovered by them nor applied as credit on principal. 141/565, 566 (5) (81 S. E. 886).

Recovery: Suits for recovery of usury must be brought within 12 months from payment thereof. 142/84 (2) (82 S. E. 492).

Plaintiff here was entitled to recover usurious interest in suit filed therefor

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within 12 months after payment. 15 App. 811 (1) (84 S. E. 211).

Set-off: Statute of limitations relating to forfeiture of usurious interest has reference to set-off claiming such forfeiture, and to suits to recover usury

which has been paid; thus, where usurious interest has been paid and applied as such, the statute is applicable in a suit brought on the obligation. 21 App. 1 (3) (93 S. E. 499).

§ 3442. (§ 2892.) **Titles tainted with usury void.** (Repealed by Acts 1916, p. 48. See § 3438 (a), ante.)

Cited. 20 App. 802, 804 (93 S. E. 538).

Assignee of bond for title can not compel conveyance by grantee under deed which was void for usury. 143/665, 666 (3) (85 S. E. 840).

Homestead: Grantor may have a homestead set apart in property sought to be conveyed, which will not be subject to a judgment on the debt, though the usury be eliminated when the judgment is taken. 141/46 (79 S. E. 1128).

Homestead waiver: Judgment on three notes, one usurious, and all waiving homestead, the waiver being invalid in the usurious note, was enforceable against property set aside as exempt in bankruptcy for the amount of the two notes. 142/833 (1) (83 S. E. 943).

Concealed usury in note waiving homestead or exemption is available to surety or indorser as defense only when not known to him when he signed instrument. 14 App. 729 (5) (82 S. E. 314).

Waiver of homestead and exemption rights in promissory note dated July 10, 1912, and infected with usury, was void as between maker and payee; where plea of usury was filed by maker, with prayer for cancellation of the waiver, it was not error, under facts here, to direct verdict cancelling such waiver of homestead. 148/170 (2) (96 S. E. 211).

Surety upon note secretly infected with usury, of which he had no knowledge, is discharged from liability if note contains waiver of homestead. 20 App. 496 (1) (93 S. E. 106); 23 App. 458 (2) (98 S. E. 361).

Waiver of homestead is void if embraced in promissory note infected with usury. 21 App. 818 (1) (95 S. E. 331).

Where surety signs ordinary promissory note, containing homestead waiver, in ignorance that it is tainted with usury, law relieves him from all

liability thereon. 22 App. 210 (3) (95 S. E. 720).

Where there is evidence to warrant jury in sustaining defense that defendants were mere sureties on homestead waiver note, tainted with usury of which they had knowledge, Court of Appeals can not interfere. 22 App. 210 (4) (95 S. E. 720).

Plaintiff in suit against surety has burden, after proof of usury, to show that surety signed note with knowledge of usury. 23 App. 458 (2) (98 S. E. 361).

Surety upon note in which there is waiver of homestead is discharged from liability when shown that at time he signed there existed secret agreement between payee and principal whereby latter was to receive and did receive usurious rate of interest. 23 App. 630 (1) (99 S. E. 151).

Jury: Question whether what transpired here amounted to general refusal of any tender that might be made was for jury. 145/835 (90 S. E. 56).

Mortgage: Where obligation palpably infected with usury contains mortgage to secure its payment, and also contains agreement that debtor shall procure loan from third person on same property, to be secured by deed which is to be superior to the mortgage, and shall then assign to mortgagee, as additional security, the bond to reconvey, received by debtor from his grantee under the security deed, neither the obligation to make such assignment nor its subsequent consummation will operate to merge or otherwise render invalid the mortgage lien. 21 App. 1 (1) (93 S. E. 499).

Conveyance here was a mortgage and not a deed, and lien of mortgage was not defeated though it was to secure usurious loan. 236 Fed. 556 (2).

Petition seeking cancellation of deed and bond for title on ground of usury, and

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also alleging that defendant having no title to premises in plaintiff's possession forcibly took possession of part of crops and interfered with tenants, should not have been dismissed on general demurrer. 146/732 (2) (92 S. E. 52).

Sale: Deed to land, given to secure note for usurious loan, is void. 143/302 (84 S. E. 961).

Security deed made to secure usurious loan is void. 142/113 (1) (82 S. E. 442).

Grantee in security deed tainted with usury can not, as against maker, convey good title even to bona fide purchaser. *Id.* 113 (2).

If deed were made to secure usurious loan and contained power to sell on failure to make payment, and if, on failure of debtor to pay, creditor exercised power to sell, purchaser did not obtain good title by virtue thereof as against maker of deed. *Id.* 113 (2-a).

Mere fact of making deed, if infected with usury, did not estop grantor from asserting invalidity as against one purchasing at sale, but conduct of maker of deed in connection with deed itself may be such as to work estoppel. *Id.* 113 (2-b).

In suit brought by purchaser under power of sale to obtain possession, to which maker of deed pleaded invalidity on account of usury, the purchaser would not have the right to have lien established for money paid at the sale. *Id.* 113 (4).

Conveyance to one as security for money advanced by grantee to purchaser on usurious note is void under this section and section 3436. 143/665 (2) (85 S. E. 840).

Lien created by trust deed given to secure corporate bonds held enforceable by trustee against corpora-

tion in favor of one who loaned it money, took note therefor, and received bonds as security, to amount actually loaned, with interest, notwithstanding this section, though debt was infected with usury. 144/761 (1) (87 S. E. 1083).

Where one loaned money to be used in purchase of land at sheriff's sale, and charged usury, deed to land, executed by borrower to secure payment of notes given for money loaned, is void; and such notes being subsequently reduced to judgment, grantee in security deed was not entitled to verdict and decree giving special lien upon land so conveyed. 145/243 (1) (88 S. E. 973).

Where, on sale under power in deed to secure debt infected with secret usury, purchaser has no knowledge of such usury and owner refuses to surrender possession, purchaser can maintain action to recover amount paid to grantee in security deed. 145/218 (88 S. E. 921).

Where security deed gave the right to redeem on payment of interest and the contract was infected with usury, the deed is also void for usury. 145/835 (90 S. E. 56).

Any usurious contract between plaintiff in *fi. fa.*, the assignee of notes given for borrowed money secured by deed of real estate, and the borrower, would not affect quitclaim deed made by original lender to plaintiff. 147/674, 675 (2) (95 S. E. 253).

Title, as used herein, has meaning of general title, signifying interest of one predicated upon general ownership. 144/761, 766 (87 S. E. 1083).

Plaintiff here was entitled to recover usurious interest in suit filed therefore within 12 months after payment. 15 App. 811 (1) (84 S. E. 211).

§ 3442 (a). Interest allowed on loans to be repaid in monthly installments.

Constitutionality: This section is not violative of section 6391, as special law on matter covered by general law, nor is it violative of section 6437 as containing matter different from that expressed in title, nor is it violative of section 6673, as denying citizens of

other States right to lend money in this State. 143/530 (1-3) (85 S. E. 749); 16 App. 592 (1) (85 S. E. 952).
"Installment plan," as used in title of this act reading, "An act to authorize any person lending money to be repaid on the installment plan to ag-

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gregate the principal and interest," embraces the words "monthly installments," as used herein. 143/530, 536 (85 S. E. 749).

Recovery: Where lender, on three installments being past due and unpaid, elected to sue for entire amount

of loan, it could not recover specified 12% interest, but could only recover legal interest from date of loan, crediting under ordinary rule of partial payments any payments made. 143/530 (4) (85 S. E. 749); 16 App. 592 (2) (85 S. E. 952).

§ 3444. Rate greater than five per cent. per month punished.

Choses in action: This section does not prohibit sale and assignment of choses in action arising *ex contractu*. 17 App. 459 (1) (87 S. E. 754).

Loan: Lien of chattel mortgage executed prior to act of 1916, amending section 3438, as security for loan of money, for use of which interest at rate greater than 5% per month has been reserved or charged, may be asserted for the principal and lawful interest on the debt. 20 App. 802 (2) (93 S. E. 538).

Where chattel mortgage to secure loan of money, for use of which interest at rate greater than 5% per month has been reserved or charged, has been executed since the act of 1916, amending section 3438, lien may be asserted for principal amount actually loaned or advanced. 20 App. 802 (2) (93 S. E. 538).

Salary: Borrower can not maintain action in equity for surrender and cancellation of usurious salary assignment, and for injunction against lender "filing" it with borrower's employer (whose custom is to discharge employees without payment or tender of actual payees who assign their salaries), money received, with lawful interest. 146/364 (91 S. E. 116).

Validity of mortgage: Fact that charging or taking of interest in excess of 5% per month is made a misdemeanor, punishable by fine and imprisonment, does not render mortgage absolutely void. 20 App. 802 (2) (93 S. E. 538).

Wages: This section does not prohibit sale of salary or wages. 17 App. 459 (1) (87 S. E. 754).

This section did not affect right to charge greater rate of discount on sale of salary or wages than five per cent. *Id.*

ARTICLE 2.

Business of Loans on Personal Property.

§ 3460. Usury, how considered.

Payment: Sustaining of demurrer to equitable petition seeking to enjoin defendants from suing petitioner or causing issuance of garnishment process will not prevent proper idea of payment in action on usurious note. 142/609, 610 (6) (83 S. E. 272).

Pleading: Petition here in action to recover usury paid was demurrable, where character of contracts between the parties could not be determined therefrom. 142/609 (5) (83 S. E. 272).

Allegations that petitioner had bor-

rowed money from others characterized as "money sharks" and paid usury to them until he had exhausted his borrowing capacity were irrelevant in action to recover usury paid and to enjoin defendants from suing petitioner or causing garnishment to issue. *Id.* 609, 610 (7).

Pleadings here were insufficient to make out case entitling plaintiff to enjoin defendant from causing garnishment process to issue. *Id.* 609, 610 (6).

§ 3465. Pledge of unearned wages or salary unlawful.

Applied. 14 App. 319 (80 S. E. 696).

Blanks: Present conveyance of authority to execute salary order or to com-

plete assignment of wages not yet earned is void, when signed in blank. 15 App. 663 (2) (84 S. E. 147).

Of bailments; general principles.

CHAPTER 13.

Of Bailments.

ARTICLE 1.

General Principles.

§ 3467. (§ 2894.) Definition.

Check: Where note of merchant was sent through bank for collection, and he wrote to original payee, inclosing new note for amount due and requesting payee to help him along and send check in time to pay note, and check was sent with statement that it was to take care of such note, and check was deposited to his credit, amount so received constituted trust fund, and was

not subject to garnishment by other creditors. 19 App. 61 (90 S. E. 975).

Redeliver: Person who promised administrator to hold property for him and not part with it without order, but who subsequently delivered to third person, was liable to administrator for loss thereby occasioned. 14 App. 597 (1) (81 S. E. 800).

§ 3468. (§ 2895.) Property in bailee.

Damages: Bailee of mule for hire, who has possession of animal under contract from day to day, but returns it every night to owner for keeping over night, may, in suit against third party for animal's death, recover full value of animal for use of owner, and also, for his own use, any damage to his right of possession or to his special property right, including expenses incurred by him for medical treatment to animal made necessary by injuries resulting from defendant's tortious act. 24 App. 725, 726 (3) (102 S. E. 182).

Lessee: By the term "lessee," as used in section 448 (oooo), Penal Code, is meant one who has some property in the vehicle or conveyance which itself may be subject of condemnation, as distinguished from mere "bailee" with special property in the vehicle or conveyance entrusted to him. 149/667

(3) (101 S. E. 795); 24 App. 714 (3) (102 S. E. 136).

Possession: Bailee entitled to possession of property bailed has such special interest therein as entitles him to maintain in his own name suit against third party for loss or destruction of property; such recovery, however, is for use or benefit of owner. 24 App. 725 (1) (102 S. E. 182).

Fact that bailee entitled to possession of property bailed has paid bailor value of property destroyed does not affect right of action against third party for loss or destruction of property. 24 App. 725 (1) (102 S. E. 182).

Bailee may maintain right of action for loss or damage resulting from injury to his right of possession or other special property right in property bailed. 24 App. 725, 726 (2) (102 S. E. 182).

§ 3469. (§ 2896.) Burden of proof.

Stated. 13 App. 617 (2) (79 S. E. 589), 753 (1) (79 S. E. 947).

Bank: Where facts which defendant relied on to show negligence on part of bank and its officers to which cotton was turned over as collateral security for notes were undisputed, and showed affirmatively that the officers failed to exercise any degree of care whatever

for preservation of property bailed, charge of court that such officers were, as matter of law, negligent in the premises, was not erroneous, the court having left it to the jury to determine whether evidence relied on by defendant to show such negligence was true. 20 App. 39, 40 (4) (92 S. E. 398).

Of bailments; general principles.

Carrier: Evidence in bailor's action for loss of two freight cars from the giving way of a trestle held to show that the cause of the wreck was the defective and unsafe condition of the trestle, and not any defect in the cars. 13 App. 753 (3) (79 S. E. 947).

Cotton: Where cotton is delivered by owner to another to be ginned for a specific price, there is a bailment for hire, and where cotton is lost by bailee burden is upon him to show due care and diligence in protecting and keeping it. 22 App. 96 (1) (95 S. E. 320).

Loss: Where bailee for hire is sued for value of property, loss of which it is alleged was occasioned by his negligent failure to perform duty expressly imposed by terms of bailment, and loss of property is made to appear, burden is upon him to show that such degree of care has been exercised. 22 App. 193, 194 (3) (95 S. E. 752).

Process: Bailee, in action against him by bailor to recover property deposited

with him, may set up as defense that property was taken from him upon legal process fair on its face, provided that bailee did not fail in any duty property owing to bailor and that bailor, if not party to that proceeding, had been given full and ample notice thereof. 23 App. 307 (1) (98 S. E. 228).

Surrender: Where bailee shows that suit for property had been instituted by a third person and that he promptly notified bailor thereof and was proceeding to defend right and claim of bailor, fact that he then proceeded, with knowledge of bailor, to surrender property to levying officer, in accordance with one of his options under the law in such cases, did not amount to conversion such as would render him liable in action of trover, but supported finding in bailee's favor that he had exercised degree of ordinary diligence required of him. 23 App. 307 (1) (98 S. E. 228).

§ 3470. (§ 2897.) **Care and diligence.**

Bank: Where facts which defendant relied on to show negligence on part of bank and its officers to which cotton was turned over as collateral security for notes were undisputed, and showed affirmatively that the officers failed to exercise any degree of care whatever for preservation of property bailed, charge of court that such officers were, as matter of law, negligent in the premises, was not erroneous, the court having left it to the jury to determine whether evidence relied on by defendant to show such negligence was true. 20 App. 39, 40 (4) (92 S. E. 398).

Mule: Deputy sheriff who levied on mule, and carried same away into

strange community, after refusing to accept bond, was liable in damages where, after being expressly cautioned by owner not to turn mule into a lot or put it under wire fence, because it would jump and would not stay under wire fence, he turned it into a lot and the mule ran into a wire fence and broke its neck. 19 App. 529 (1) (91 S. E. 930).

Officer entrusted by law with possession of personal property is liable to owner of that property for negligence in performance of his trust or duty, or for fraud or neglect in the execution of his office. 19 App. 529, 530 (91 S. E. 930).

§ 3471. (§ 2898.) **Ordinary.**

Stated. 141/140 (2) (80 S. E. 655).

Definition: Ordinary diligence is variable term, and is such diligence as is adjusted to and befits circumstances which require exercise of reasonable

care, foresight, and prudence. 14 App. 35 (81 S. E. 387).

Hire: Bailee for hire is chargeable with duty of ordinary diligence. 22 App. 193, 194 (3) (95 S. E. 752).

§ 3472. (§ 2899.) **Extraordinary.**

Cited. 15 App. 751, 753 (84 S. E. 198).

Hire: Extraordinary diligence is not required of bailee under contract of

Of hiring.

hire; and on trial of action against such a bailee by bailor it was error to give in charge Code definition of

such diligence. 24 App. 178 (2) (100 S. E. 236).

§ 3474. (§ 2901.) Due care in child.

Stated. 140/727 (5) (79 S. E. 836).

Age: Children are only required to exercise such care for their own safety as may reasonably be expected in view of their age and condition. 20 App. 8, 11 (92 S. E. 772).

Child less than fourteen years of age is not bound to exercise ordinary care exacted of every prudent man, but only to exercise due care according to his age and capacity; such care as the capacity of the particular child enables it to use naturally and reasonably, is what the law requires. 21 App. 315 (1) (94 S. E. 287).

Charge in action by child of tender years against employer for personal injuries that "if the plaintiff, the law says, by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, if shown, he is not entitled to recover," was erroneous as placing upon the injured child the burden of exercising "ordinary" care instead of "due" care exacted by law of person of his age, experience, intelligence, etc. 21 App. 315 (3) (94 S. E. 287).

A servant who is over fourteen years of age is presumptively chargeable with same degree of diligence for his own safety as an adult engaged in the same work. 21 App. 558 (1) (94 S. E. 821).

Servant nineteen years old, of fair education and training, chargeable with same degree of diligence for own safety as adult engaged in same work. 23 App. 408 (1) (98 S. E. 419).

Child only two and a half years old is incapable of contributory negligence. 24 App. 411 (2) (101 S. E. 2).
Change of employment: Where suit for damages is maintained in minor's own behalf, fact that employer might have changed work and duties of employment would not relieve plaintiff of duty to exercise that degree of intelligence, knowledge, and judgment actually possessed by him; proof of such change of employment would not of itself furnish ground of recovery where it appears that injury was brought about by plaintiff's own inexcusable negligence. 23 App. 299 (2) (98 S. E. 192).

§ 3475. (§ 2902.) Imputable negligence.

Driver: While evidence here clearly showed that chauffeur of sight-seeing automobile, in attempting to cross track in front of rapidly approaching train, was lacking in ordinary care for

his own safety and that of his passengers, under facts as disclosed by record his negligence could not be imputed to his passengers. 18 App. 261 (5) (89 S. E. 383).

ARTICLE 2.

Of Hiring.

§ 3476. (§ 2903.) Contract of hiring.

Special purpose: Contract founded upon consideration, whereby goods are intrusted to another for execution of special purpose, after which they are

to be returned to one making delivery, constitutes person receiving them bailee for hire. 22 App. 193 (1) (95 S. E. 752).

§ 3479. (§ 2906.) Obligations of the bailor.

Livery-stable keeper is not common carrier of passengers, and is bound only

to exercise ordinary care and diligence. 13 App. 284 (2) (79 S. E. 77).

Of hiring.

Where one hires for use of himself and family a vehicle ordinarily used for the carriage of several persons, the owner owes to each member of the family using the vehicle the same degree of care as is owing to the per-

son to whom the vehicle is let. *Id.* 284 (3).

Secret fault: Bailor for hire impliedly warrants that thing bailed is free from any secret fault rendering it unfit for purpose for which intended. 14 App. 134 (2) (80 S. E. 666).

§ 3480. (§ 2907.) **Engagement of the hirer.**

Animals: On trial of action for damages against hirer of mule which it was alleged was taken sick while in his possession and was worked, mistreated, and neglected by him until it died, it was error to charge that in cases of loss presumption of law is against bailee, and no excuse avails him unless it was occasioned by the act of God, and that in order for bailee to avail himself of the act of God, he must establish not only that such act occasioned the loss, but that his own negligence did not contribute thereto. 24 App. 178 (3) (100 S. E. 236).

Instruction: Where there was evidence which would have authorized finding that bailment was one for hire, court erred in assuming as matter of law that bailment was gratuitous, and in charging that defendant bailee would

be liable for gross negligence only. 18 App. 646 (1) (90 S. E. 223).

Court here should have charged jury that if they found bailment to be for hire, burden of proof would be upon defendant company to show, by preponderance of evidence, that it had exercised ordinary care and diligence. 18 App. 646 (1) (90 S. E. 223).

Where all evidence submitted demanded finding that defendant company had used ordinary care and diligence, error in assuming as matter of law that bailment was gratuitous one and in charging jury that defendant bailee would be liable for gross negligence only was not such that verdict in favor of defendant company would be reversed. 18 App. 646 (2) (90 S. E. 223).

§ 3482. (§ 2909.) **For torts, who may sue.**

Right of action: Bailee of mule for hire, who has possession of animal under contract of bailment from day to day, but returns it every night to owner for keeping over night, has such

special interest in bailment as entitles him to maintain suit against third party for animal's death. 24 App. 725, 726 (3) (102 S. E. 182).

§ 3485. (§ 2912.) **Reletting.**

Cited. 148/153, 155 (96 S. E. 131).

§ 3488. (§ 2915.) **Rule of duty.**

Care required: Where owner of mule leaves it with blacksmith to be shod, duty rests on latter to exercise ordinary care for safety of animal and to employ skill in the work. 142/668, 669 (3) (83 S. E. 521).

Pleading: Petition in action against blacksmith for killing mule while in his possession to be shod, alleging breach of duty through failure to exercise ordinary care in carrying out th bailment, and resulting injuries, was sufficient as against general demurrer. 142/668, 669 (3) (83 S. E. 521).

Petition considered in its entirety stated action *ex delicto*, founded on breach of duty springing from violation of contract of bailment. *Id.* 669 (2).

Petition was subject to appropriate special demurrer where it failed to allege particular act of negligence relied on. *Id.* 669 (4).

Allegation that defendant caused mule to be thrown down while being shod, thereby killing it, was sufficient here to constitute allegation of specific acts of negligence. *Id.* 669 (5).

Of deposits.

ARTICLE 3.

Of Deposits.

§ 3501. (§ 2928.) **Deposits for hire.**

Stated. 13 App. 456 (1) (79 S. E. 235).

§ 3502. (§ 2929.) **Factor's lien.**

Definition: Factor is one who not only receives goods and merchandise for hire, but, being entrusted with the possession, control, and disposal of the goods of his principal for a commission, has a lien for all advances made thereon and expenses incurred in respect thereto. 22 App. 455 (1) (96 S. E. 347).

Diligence: Under contract of bailment here authorizing sale, bailee not liable for such damages to goods as were naturally incident to efforts to sell same according to custom of trade. 15 App. 658 (3) (84 S. E. 163).

Sale: Where cotton factor has advanced large sums so that his interest in cotton equals or exceeds that of the owner, he may exercise his discretion as to time of selling cotton even in all disregard of owner's instructions, providing he acts with due regard both to his own interest and that of the owner. 13 App. 425, 426 (3) (79 S. E. 912).

Contract of bailment authorizing sale of goods here authorized handling of goods according to usual methods adopted to facilitate sales and not to require that bailee store them away. 15 App. 658 (2) (84 S. E. 163).

Cotton factors, who had sold cotton in accordance with general usage to reimburse themselves for advances, not liable where they deemed security

insufficient and customers had failed to deposit more margins. 17 App. 57 (1) (86 S. E. 256).

Where factors have made advances, they are not bound to hold goods, if customer fails to deposit margins required. Id. 57 (2).

Where factors were warranted in selling property consigned, that customer was solvent and that factors held his note is no ground for relief. Id. 57 (3).

In absence of contract whereby factors were bound to hold cotton as instructed by customer, they were not bound so to hold it, where customer failed to deposit margins necessary to hold it after he had been notified to do so. 19 App. 323 (1) (91 S. E. 446).

Factor may, as general rule and in accordance with usages of trade, sell sufficiency of goods entrusted to him in order to liquidate his demands for advances made and expenses incurred. 22 App. 455 (1) (96 S. E. 347).

Even though factor's agency be coupled with an interest, if there should be an express contract whereby goods are to be held until sale is authorized, factor is bound by terms of agreement as actually made, and is liable to owner for any damages which may be sustained by reason of an unauthorized sale. 22 App. 455 (1) (96 S. E. 347).

§ 3503. (§ 2930.) **Warehouseman.**

Charge: Where suit against warehouseman is based solely upon alleged breach of expressed contract, and court properly charges jury upon rules of law pertaining to rights of plaintiff and liability of defendant under contentions as made, it is not error to omit to charge principle of law embodied in this section. 22 App. 507 (2) (96 S. E. 330).

Conversion: Where bailee shows that suit for property had been instituted by a third person and that he promptly notified bailor thereof and was proceeding to defend right and claim of bailor, fact that he then proceeded, with knowledge of bailor, to surrender property to levying officer, in accordance with one of his options under the law in such cases, did not amount to

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conversion such as would render him liable in action of trover, but supported finding in bailee's favor that he had exercised degree of ordinary diligence required of him. 23 App. 307 (1) (98 S. E. 228).

Fire: Warehouseman agreeing to insure cotton which was subsequently destroyed by fire, is liable for full value, though acting in good faith in compromising with the insurers on policies covering cotton, and not being guilty of negligence, and though failing to insure the particular cotton. 13 App. 621 (79 S. E. 584).

Insurance: Warehouseman liable for damages to goods, if he commits breach of duty to insure imposed by contract or custom. 140/669 (1) (79 S. E. 474).

If warehouseman insures goods and collects money from insurer for loss, he holds funds so collected for benefit of insured customers or those who may have succeeded to their rights, subject to legitimate charges. *Id.* 669 (2).

Where at time of fire only part of goods in storage are insured, and fire renders some of the goods incapable of identification, fund derived from sale of such goods by warehouseman will be held by warehouseman for benefit of all the owners of the goods whether included among the insured or uninsured class. *Id.* 669 (3).

If warehouseman breached duty to insure by failure to insure for as much as duty required, he is liable to insuring customers severally to the extent of the deficiency of the insurance. *Id.* 669 (5).

Equity will entertain one suit for an accounting with all the customers, and for individual recoveries of damages over and beyond the amounts apportioned to each of the customers under such accounting. *Id.* 669 (6).

§ 3510. (§ 2937.) Deposit of valuables.

Negligence: Where innkeeper provided safe and posted notice as required, he was not liable for articles stolen from bed room because of negligence in providing suitable lock on door or in

Where it appeared that duty to insure covered only a period of thirty days, commencing on date of storage of the goods, erroneous to overrule special demurrer complaining that petition failed to allege the several dates on which the goods were stored. *Id.* 669, 670 (7).

Where warehouse company breaches agreement to insure at full value cotton stored with it, and cotton is destroyed by fire, company is liable to owner for full value thereof, less legitimate charges. 144/598 (1) (87 S. E. 804).

Lien: Warehouseman has special lien, and may retain possession of property stored until payment of charges and presentation of warehouse receipt or giving of indemnity bond if receipt be lost. 17 App. 589 (87 S. E. 845). ✓

Warehouseman's lien for storage charges on property deposited with him is not superior to exemption rights established by setting it apart as homestead property, although it be set apart after accrual of storage charges; in such case the warehouseman has only a lien, and not such a property right as will defeat the exemption. 20 App. 149 (92 S. E. 761).

Process: Bailee, in action against him by bailor to recover property deposited with him, may set up as defense that property was taken from him upon legal process fair on its face, provided that bailee did not fail in any duty properly owing to bailor and that bailor, if not party to that proceeding, had been given full and ample notice thereof. 23 App. 307 (1) (98 S. E. 228).

Receipt of warehouseman, providing that cotton was held subject to presentation of receipt only, was subject to proof that by a recognized local custom, defendant undertook to insure all cotton in his warehouse. 13 App. 621 (79 S. E. 584).

placing fire escape so as to afford easy access to room. 141/530 (2) (81 S. E. 874); 14 App. 618 (82 S. E. 155).

Valuable articles: Diamond rings, watch-bracelet, and topaz chain and watch

Pledges and pawns.

are valuable articles, and where guest placed them on bureau in her room and they were stolen, innkeeper who had

complied with this section was not liable. 141/530 (1) (81 S. E. 874); 14 App. 618 (82 S. E. 155).

§ 3515. (§ 2943.) **Keeper of livery-stable.**

Diligence: Livery-stable keeper should exercise extraordinary diligence for protection and safe-keeping of mule entrusted to him. 143/495 (85 S. E. 694).

Livery-stable keepers who let animals and vehicles for hire are bound only to exercise ordinary care and diligence. 13 App. 284 (2) (79 S. E. 77).

Livery-stable keepers are bound only to exercise ordinary care and diligence in providing animal suitable for purpose for which it is hired. 14 App. 134 (1) (80 S. E. 666).

Burden is on plaintiff to prove that defendant was lacking in ordinary care in furnishing him animal unsuited

for purpose for which hired. Id. 134, 135 (4).

Personal injuries: Where person other than one to whom animal is hired is injured from vicious propensities of animal he can not recover unless owner knew, or had reasonable grounds to know, of such propensities, and was wanting in ordinary care to protect public from injury therefrom. 14 App. 134, 135 (3) (80 S. E. 666).

Where one hiring animal from livery-stable keeper shows that injuries resulted from animal's disposition and that defendant was lacking in ordinary care in furnishing animal unsuited for purpose for which hired, he need not prove scienter. Id. 134, 135 (4).

ARTICLE 5.

Pledges and Pawns.

§ 3528. (§ 2956.) **What is a pawn.**

Cited. 144/761, 766 (87 S. E. 1083); 17 App. 631, 632 (87 S. E. 918).

Stated. 18 App. 639 (3) (90 S. E. 79); 22 App. 455, 456 (2) (96 S. E. 347).

Collateral means additional, subsidiary security for principal obligation, standing by principal promise as cumulative means for securing debt. 17 App. 652, 655 (88 S. E. 33), citing 2 Words & Phrases 1253.

Electricity: Where electric service was discontinued for default in payments by customer while he had sum on deposit as collateral security, company could recover its meter and electric lamps from customer. 17 App. 652, 655 (88 S. E. 33).

Evidence: Where, in trover to recover personalty which defendants claimed

was deposited as collateral security, it appeared that plaintiff was indebted on open account, and defendants could retain property until debt was paid, evidence that note was invalid was immaterial. 14 App. 299 (2) (80 S. E. 697).

Lien: Where securities are pledged to bank to secure payment of particular loan or debt, bank has no lien on them to secure payment of general balance due to it from pledgor, nor for payment of any other claim or indebtedness than one for which they were specifically pledged. 18 App. 515 (1) (89 S. E. 1051).

Sale is distinguishable from "pledge" or "pawn," in that in former title passes, while in latter it does not pass. 16 App. 249 (1) (85 S. E. 86).

§ 3529. (§ 2957.) **Pledge of notes.**

Cited. 144/761, 766 (87 S. E. 1083).

Amount: Where holder of negotiable note, who has received it from payee

as collateral security, sues maker, if latter has valid defense against original payee he can by appropriate plea

Pledges and pawns.

set it up, and if it be sustained, holder can recover no more than debt which collateral secured; presumption is that secured debt is sufficient to consume collateral, and onus of pleading and proving less amount and maker's equity against original payee is on defendant. 18 App. 515 (2) (89 S. E. 1051).

Where, after allowing reduction on note, claimed by defendant on account of alleged failure of consideration, there was evidence from which jury could find that remaining unpaid

balance of indebtedness specifically secured by note was less than amount of recovery in favor of transferee holding note as collateral, onus of pleading and proving that a less amount than amount of verdict rendered in favor of transferee was due by original payee to such transferee was sufficiently carried. 18 App. 515, 516 (2-a) (89 S. E. 1051).

Value: Pledgee of collateral note is holder for value. 16 App. 706, 720 (86 S. E. 49).

§ 3530. (§ 2958.) Sale by pawnee.

Cited. 144/761, 766 (87 S. E. 1083); 17 App. 631, 637 (87 S. E. 918).

Notice: Unless otherwise provided by contract, pledged property can not be sold until after thirty days' notice to pledgor of intention to sell. 22 App. 455, 456 (2) (96 S. E. 347).

Recoupment: Where suit is brought by pledgee for balance due on obligation, after giving credit for net proceeds from sale of property pledged, defendant can elect to set up by way of recoupment a conversion of the property, by showing noncompliance with rules governing such a sale. 22 App. 455, 456 (3) (96 S. E. 347).

Where suit is brought by pledgee for balance due on obligation, after giving

credit for net proceeds from sale of property pledged, measure of damages, where defendant sets up by way of recoupment conversion of property, by showing noncompliance with rules governing sale, is difference between amount of credit allowed and actual value of property at time of sale. 22 App. 455, 456 (3) (96 S. E. 347). *Id.*

Where jury is authorized to find that sale was made at time when it could be legally effected, noncompliance with statutory requirements governing sale will not authorize defendant to recover by way of recoupment difference between value of property at time of sale and its value at subsequent date. *Id.*

§ 3531. (§ 2959.) Use of goods pawned.

Cited. 144/761, 766 (87 S. E. 1083).

Dividend: Where creditor of insolvent bank holds collateral security for portion of debt, and receiver of bank realizes from its assets amount of cash to be applied to its debts, creditor is not entitled to dividend upon entire indebtedness due, as though he had no collateral; such secured creditor must first apply amount realized from collateral to reduce amount of indebtedness, and is entitled, like other creditors, to dividend upon unpaid balance. 147/74 (92 S. E. 868), 274 (9) (93 S. E. 880).

Production: Where action is brought to enforce payment of debt for which collateral security has been given, it is incumbent upon plaintiff to produce

and restore the collateral security, or to account satisfactorily for its nonproduction. 20 App. 36 (2) (92 S. E. 397).

Sale: Where cotton was delivered to bank with agreement that it was not to be sold before a certain date, unless defendant directed otherwise, and such cotton was shipped away before the date mentioned, without knowledge or consent of defendant, bank was liable for its breach of contract in failing to preserve the cotton, as it had impliedly agreed to do. 20 App. 39 (3) (92 S. E. 398).

Fact that defendant did not exercise his right of election under the contract until after appointment of receiver for the bank was immaterial. *Id.*

Pledges and pawns.

Charge that defendant would be entitled to value of cotton at time to which bank agreed to carry it, and when he made demand that cotton be sold and credited on note, that he

would be entitled to credit of amount which cotton would bring, not when actually sold but when it was contracted and agreed that it should be sold, was not erroneous. *Id.*

§ 3532. (§ 2960.) **Property in goods pawned.**

Cited. 144/761, 766 (87 S. E. 1083).

Stated. 18 App. 639 (3) (90 S. E. 79).

§ 3533 (§ 2961.) **Transfer.**

Production of collateral: Error, in action on note reciting that collateral was given to secure its payment, wherein collateral was neither tendered nor accounted for, to strike plea alleging that collateral was given and that plaintiff was unable to produce same. 17 App. 631 (1) (87 S. E. 918).

Plaintiff must either produce collateral or satisfactorily account for its nonproduction. *Id.*

First sentence of first headnote in 17 App. 631 (87 S. E. 918), construed alone, is misleading; whole head note construed together means that where action is brought to enforce payment of debt for which collateral security has been given, plaintiff must either produce and restore such security or account satisfactorily for its nonproduction, in event plea of recoupment is filed which alleges conversion of collateral, or that such collateral was actually deposited, and in which the ability of plaintiff to produce the col-

lateral is denied. 21 App. 180, 181 (94 S. E. 266).

Where note sued on is an ordinary promissory note, with two other persons signing as security, and the note contains no reference to collateral, it was not incumbent upon plaintiff either to produce and restore the collateral security, or to account satisfactorily for its nonproduction, in order to recover. 21 App. 180, 181 (94 S. E. 266).

As a general rule pledgee is not required to surrender or enforce collateral before suing on principal obligation; however, in certain instances and under proper pleas, defendant may show conversion of the collateral, or negligent failure to collect and loss to himself in consequence thereof. 21 App. 180, 181 (94 S. E. 266).

Tender: Pledgor is not entitled to recover pledge of assignee of pledgee, unless he pays the debt secured, or tenders payment, or the facts excuse a tender. 140/759 (79 S. E. 771).

§ 3535. (§ 2963.) **Liability of pawnee.**

Attorney's fees: Court erred in overruling finding of auditor that holders of collaterals were entitled to certain specified expenses necessarily incurred in realizing upon the collaterals. 147/273, 274 (10) (93 S. E. 880).

Insurance: Where warehouse receipts for cotton are delivered in pledge or pawn

to secure payment of existing indebtedness, in absence of special agreement to that effect, exercise of ordinary care on part of pawnee devolving upon him by law does not require that he shall keep the property insured against loss by fire. 18 App. 639 (4) (90 S. E. 79).

Of principal and surety; the contract.

CHAPTER 14.

Of Principal and Surety.

ARTICLE 1.

The Contract.

§ 3538. (§ 2966.) What constitutes suretyship.

Stated. 13 App. 826 (1) (80 S. E. 1093).

Cited. 142/663, 665 (83 S. E. 526).

Conditional signature: One who signs or indorses note as surety can not in defense to action thereon, either by innocent payee or any other bona fide holder for value, set up that principal maker, to whom he intrusted note, delivered it in violation of condition that certain other person or persons should first sign or indorse it. 20 App. 576 (3) (93 S. E. 173).

Consideration: Indulgence to her principal by surety was sufficient consideration for contract of suretyship. 13 App. 153 (1) (78 S. E. 1024).

Dollar which is part of consideration stated is not such benefit to parties signing as sureties as is contemplated by this section; substantial consideration for this contract was credit and indulgence given to third person named. 20 App. 691 (1).

Where note was executed by one as principal and by another as surety, and consideration therefor was illegal and immoral, but this fact was unknown to surety at time of execution and delivery of note, surety may nevertheless defend suit thereon by showing that note was in fact executed by the principal for such consideration. 22 App. 433 (3) (96 S. E. 269).

Contemporaneous agreement: Where one agrees to become another's agent to take from him and pay for certain goods at certain price, and simultaneously third person signs agreement annexed to contract assuming responsibility for any debt incurred by agent to principal, third person's liability is that of surety. 17 App. 648 (1) (87 S. E. 1090).

Contract of suretyship, and not of guaranty, is made where, in writing signed by persons designated therein

as sureties, in consideration of one dollar paid by named company and execution of contemporaneous agreement between company and third person for sale of goods to him by it, and extension of time of payment of existing indebtedness to it, persons signing as sureties promise and "guarantee" payment of that indebtedness and payment for goods as provided in agreement referred to. 20 App. 691 (1) (93 S. E. 270).

Credit: Contract of suretyship exists where one pledges his credit for benefit of another, and it is distinguished from guaranty in that in latter form of obligation the consideration is a benefit flowing to the guarantor. 19 App. 177, 179 (91 S. E. 251).

Distinction: Fundamental distinction between guaranty and suretyship is that in contract of guaranty person obligating himself to pay debt of another is primarily, and not secondarily, liable. 20 App. 691 (1-b) (93 S. E. 270).

Evidence held not objectionable as tending to show that defendant was a surety, after judgment had been rendered against him as a principal. 140/45 (78 S. E. 335).

Fidelity insurance: There is a well-recognized difference between a contract of suretyship and one of fidelity insurance as defined in section 2550. 13 App. 826, 831 (80 S. E. 1093).

Indorser: Where maker of note applied for loan, which was granted on condition that defendant go on note, and maker received money and security was given on his property, defendant was merely surety. 144/703 (87 S. E. 1059).

Adding of "indorser" to signature on back of note does not change nature of liability, and one signing is liable as surety. 24 App. 256 (100 S. E. 725).

General note on guaranty.

Insurer of debt is surety. 17 App. 648 (1) (87 S. E. 1090).

Parol evidence admissible to show that persons signing as guarantors did so without independent consideration, and that contract was one of suretyship. 143/324 (1) (85 S. E. 126).

Plea, in suit against surety on note, setting up that defendant was induced to sign by false and fraudulent representation of plaintiff's agent that in consideration of defendant signing as surety plaintiff would furnish to the principal additional goods in a named

amount, which promise plaintiff had failed and refused to perform, and which failure resulted in injury and increased the risk and hazard to defendant, was not subject to general demurrer. 23 App. 186 (2) (98 S. E. 107).

Venue: Fact that sheriff's return showed that principal on note sued on was not found in county did not deprive court of jurisdiction to render judgment against surety. 15 App. 433 (83 S. E. 673).

General Note on Guaranty.

Acceptance: Where instrument does not express absolute and present guaranty, but its import is merely to carry an offer or proposal of such a guaranty, contract is not complete until minds of parties have met by acceptance of offer. 20 App. 429 (1) (93 S. E. 106).

Amount: Where a guarantor by letter fixed the amount for which he would be liable, the extent of his liability depended upon such letter and not upon the amount of credit extended. 141/44 (5) (80 S. E. 313).

Attorney's fees: Where defendant guaranteed payment for goods shipped to a third person, in a letter of credit binding him to pay attorney's fees in case of suit, defendant was liable for such fees. 141/44 (4) (80 S. E. 313).

Bank: Where bank, holding for collection draft with bill of lading attached, notifies drawer through its cashier, that it has sufficient collateral to pay draft, and guarantees payment, and bank has authority from drawee to make such application and where, on faith of representation, drawer consents to delivery of bill of lading and relies solely on bank for payment, such conduct on part of bank constitutes original undertaking, within scope of its general business and is enforceable as such. 19 App. 177 (2) (91 S. E. 251).

Certificates of deposit: Contract of one who agrees to indorse certificates of deposit issued by a trust company and to guarantee against loss thereon is one of guaranty. 23 App. 447 (2) (98 S. E. 414).

Conditional: Where liability of promisor is fixed by mere default of principal,

it is an absolute guarantee; but if promisor's liability depends upon any other event than nonperformance of principal, it is a conditional guaranty. 19 App. 155 (3) (91 S. E. 240).

If, by terms of contract of guaranty, intent of parties is ascertained to be that liability on part of guarantor is conditioned upon furnishing to him of information of acts of default by party for whose benefit guaranty is made, guarantor may stand upon precise terms of condition to obligation, and in suit on such contract plaintiff must allege and prove performance of condition which was prerequisite to his cause. 20 App. 429 (2) (93 S. E. 106).

Consideration: Where trust company, under contract of guaranty, agreed to assume and pay off liabilities of bank upon condition that makers of bond furnished to it would indemnify company to certain extent, and upon further agreement that certain banks should afford additional indemnity, contention raised by demurrer that indemnity contract or bond of directors of bank was binding on makers thereof only upon further consideration that certain national banks would additionally guarantee and indemnify the company against loss to an extent named is without merit. 22 App. 348, 349 (4) (95 S. E. 1025).

Construction: Statement in contract for "electric outfit" that guaranty is "good for six months, but does not apply to batteries," merely excluded the guaranty from applying to the batteries, and did not mean that seller could install different batteries from

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those which he contracted to sell. 140/70 (1-a) (78 S. E. 423).

Where intent of parties is clearly expressed in instrument, or has been fully ascertained from circumstances, rule of strict construction applies, and the guarantor may stand upon precise terms of his contract. 19 App. 155 (5) (91 S. E. 240).

If, after application of rule that terms and language employed in contract of guaranty are to have reasonable and ordinary interpretation, according to intent of parties, etc., there still remains an ambiguity, such doubt will be resolved by construing instrument most strongly against person who prepared it: construction as would create condition breach of which would entirely relieve guarantor, in absence of such intention appearing in contract, will not be favored. 20 App. 429 (2) (93 S. E. 106).

Contract of guaranty is stricti juris, and guarantor may stand upon precise terms of his contract. 23 App. 447, 452 (98 S. E. 414).

Corporation: Agreement to take corporate stock off of other contract party's hands, at not less than par, at any time after November, 1912, unless it should pay certain dividends, was continuing guaranty of value of stock, and not invalid for uncertainty as to time of performance. 15 App. 622, 623 (2) (83 S. E. 1101).

Definition: Guarantor is an insurer of the solvency of the principal debtor or of his ability to pay. 17 App. 648 (1) (87 S. E. 1090).

Demand: Proof of demand for compliance with antecedent condition of contract of guaranty was essential to plaintiff's right to recover. 15 App. 622, 623 (3) (83 S. E. 1101).

Discharge: General guarantor for value, guaranteeing payment of note against loss thereon, is not discharged by failure of creditor to institute legal proceedings against maker, although maker becomes insolvent. 18 App. 569 (2) (90 S. E. 102).

Joint suit: In an action against a guarantor, not essential that the principal debtor be joined as a party defendant. 141/44 (3) (80 S. E. 313).

Guarantor can not be sued jointly

with principal debtor. 23 App. 447 (2) (98 S. E. 414).

Judgment: It was not necessary to obtain judgment against principal before proceeding against surety or guarantor, where contract was to pay guaranteed amount upon failure of principal to make prompt and punctual payment of amount set opposite his name in contract, and his failure to do this was distinctly alleged in petition. 22 App. 348 (3) (95 S. E. 1025).

Letter of credit authorizing shipment of goods on a third person's order, and agreeing that if the third person should fail to pay for the goods by a certain date, the writer would pay for the same, amounts to a guaranty. 141/44 (1) (80 S. E. 313).

Limitation of liability: Guarantor of any class may by his contract limit his liability according to his own pleasure, and stipulate for such diligence or preliminary action on part of creditor as he may choose to exact. 19 App. 155 (2) (91 S. E. 240).

Note: Guarantor of debt not discharged by creditor taking note from debtor without consent of guarantor. 13 App. 28 (78 S. E. 686).

Notice: Where a letter of credit authorizing shipment of goods on the order of a third person, and agreeing to pay for same, waived notice of the shipments, notice of acceptance of the guaranty was unnecessary. 141/44 (2) (80 S. E. 313).

Where credit to be given or other consideration of guaranty is executory and uncertain as to amount for which, or time at which, guarantor is to become liable, notice of acceptance of guaranty must be given to guarantor in order to bind him. 18 App. 429 (1) (89 S. E. 523).

Where it does not appear from petition that plaintiff in suit against guarantor ever gave guarantor notice required by contract, court did not err in dismissing petition on general demurrer. 19 App. 155, 156 (7) (91 S. E. 240).

Where undertaking of guaranty recites that it is made in accordance with request of party extending credit, and it amounts to absolute promise to become responsible in stated sum, mere extension of credit while promise is

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unrevoked is sufficient to render contract complete and binding, without further notification of acceptance to guarantor. 20 App. 429 (1) (93 S. E. 106).

Where suit was brought against guarantor under agreement reciting that "In accordance with your request I will guarantee the account of P. with your company to the amount of \$1000. In case accounts are not settled promptly in thirty days, please notify me of same," followed by address and signature, court did not err in overruling demurrer setting up that petition failed to show that plaintiff had given to defendant notice mentioned in the agreement. 20 App. 429 (2) (93 S. E. 106).

In construing contract of guaranty with reference to whether or not notice referred to amounted to condition precedent to liability thereunder, instrument is not to be construed most favorably either for or against guarantor, but terms and language are to have reasonable and ordinary interpretation, according to intent of parties as disclosed by instrument read in light of circumstances and purpose for which it was made. 20 App. 429 (2) (93 S. E. 106).

Where, without notice of formal acceptance, salesman and guarantor proceeds to order out goods under the contract with his employer, and the goods are shipped by employer as directed, and note covering and guaranteeing purchase-price is actually made and delivered, the contract of guaranty will be considered as complete and executed, and, upon suit on note so given, maker will not be permitted to avoid same by reason of employer's failure to furnish formal notice of acceptance under original contract. 21 App. 45 (2) (93 S. E. 511).

Where contract of guaranty is executory, and is in form continuing, and provision has been made therein for withdrawal by guarantor, he has legal right to withdraw therefrom, and will not be held liable for indebtedness incurred after giving notice that he intends no longer to stand as guarantor, since revocation may be effected by voluntary act of guarantor, if con-

sideration for guaranty is not executed. 22 App. 492 (3) (96 S. E. 578).

Novation discharges guarantors; rule not altered by fact that change in contract, made without knowledge or consent of guarantor, nevertheless inured to benefit of principal and guarantor. 13 App. 502, 503 (3, 4) (79 S. E. 375).

Parol evidence admissible to show that persons signing as guarantors did so without independent consideration, and that contract was one of suretyship. 143/324 (1) (85 S. E. 126).

Parties: It is not necessary, in order to maintain action against one generally guaranteeing against loss, to make original promisors parties to action. 18 App. 569, 570 (3) (90 S. E. 102).

Petition by company in action for goods sold to C., in reliance on letter from B. to K., stating that he would be liable for goods furnished C. by K. stated no cause of action against B. 142/803 (1) (83 S. E. 935).

In suit against a guarantor, performance by plaintiff of condition precedent, to be performed by him, must be averred in the petition. 19 App. 155, 156 (6) (91 S. E. 240).

Against one who, before goods were sold and delivered, guaranteed in writing payment therefor, on faith of which guaranty sale was made, recovery may be had upon petition setting forth account, copy of contract of guaranty, refusal to pay account by principal debtor, notice by creditor to maker of guaranty, before goods were sold and delivered, that same was accepted, and alleging that on faith of guaranty goods represented by account sued on were sold and delivered as requested in said guaranty. 19 App. 654 (91 S. E. 1005).

Solvency or insolvency of original undertakers is not material in action against one generally guaranteeing against loss. 18 App. 569, 570 (3) (90 S. E. 102).

Third person: Letter of credit to named person is not binding in favor of third person, induced by drawer to extend credit to person named. 142/803 (2) (83 S. E. 935).

Of principal and surety; the contract.

§ 3539. (§ 2967.) **The nature of the obligation.**

Cited. 142/663, 665 (83 S. E. 526).

Amount: Balance due by principal on contract of suretyship must determine amount due by surety. 15 App. 671 (2) (84 S. E. 175).

Knowledge: Where maker of note, indorsed by payee for accommodation, induced third person, in consideration, of \$100.00 paid by maker, to pay amount of note at maturity to bank that discounted it, and such indorser had no knowledge of transaction, conduct of maker and of person taking up note operated to discharge indorser. 18 App. 626 (1) (89 S. E. 1097).

Payment: Charge that plaintiff contended that he "did pay the amount due on it and had it delivered to him, and that it was not intended, and did not pay off, extinguish, and discharge the note at all—simply paid the amount due on it and had the note delivered to him," submitted transaction that could not have legal existence and was erroneous. 18 App. 626 (2) (89 S. E. 1097).

Verdict in favor of principal, discharging him from liability, extinguishes ipso facto the obligation of the surety. 22 App. 604, 605 (9) (96 S. E. 711).

§ 3540. (§ 2968.) **Stricti juris.**

Stated. 13 App. 516, 517 (79 S. E. 492); 19 App. 155 (1) (91 S. E. 240).

Applied. 17 App. 542 (87 S. E. 826).

Fidelity bonds: Rules governing ordinary contracts of insurance, rather than contracts of suretyship, apply to fidelity bonds. 19 App. 352 (91 S. E. 494).

Guaranty: Rights of guarantor are stricti juris. 15 App. 622, 623 (3) (83 S. E. 1101).

Information: If contract of suretyship expressly provides for giving information of specific acts, such information must be given although obligee considers such acts of no importance; else the surety will be discharged. 19 App. 155 (4) (91 S. E. 240).

Notice: Where contract of suretyship stipulates that notice of principal's default shall be given to the surety,

failure to give such notice within time specified, or to give notice promptly if contract provided for immediate notice, will prevent recovery from surety. 19 App. 155 (4-a) (91 S. E. 240).

Under bond given by contractor for faithful performance of building contract providing that the bond is executed by surety upon certain conditions, which shall be conditions precedent to right of owner to recover thereunder, and one condition is that surety shall be notified in writing of any act on part of principals which may involve loss for which surety is responsible, etc., where contract is abandoned by contractors, giving of notice thereof to surety is condition precedent to recovery on the bond. 21 App. 758 (2) (95 S. E. 113).

§ 3541. (§ 2969.) **Form immaterial.**

Consideration: Where negotiable promissory note purports to have been given for value received, and suit is brought by payee, maker may plead and prove by parol that note was executed without consideration and for sole purpose of enabling payee to indorse it to third person as collateral security for debt which payee desired to contract and which he promised to pay without assistance from maker; such note is mere accommodation paper, and, while in hands of person to be accommodated, is without consideration and binds nobody, but it would be other-

wise if note were in hands of an indorsee who received it for value. 22 App. 417 (1) (96 S. E. 217).

Election: Indorser, though accommodation indorser only, is surety, and creditor who holds execution against both principal and surety may, at his election, proceed against property of either. 20 App. 741, 742 (4) (93 S. E. 236).

Estoppel: Where written assignment of note, signed by payee, recites that for value received he transferred and assigned the note with full recourse on himself, payee was estopped from testi-

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fyng that as matter of fact he was an accommodation indorser only. 20 App. 489 (1) (93 S. E. 115).

Evidence: Where in suit on note signed by G. and defendant corporation latter pleaded that it had received no consideration whatever for signing note, and that it was an accommodation indorser only, testimony of witness in reply to question as to what connection G. had with defendant corporation in the way of having any interest, that he understood that G. had stock in the store was admissible over objection that it was immaterial and irrelevant. 20 App. 436 (4) (93 S. E. 108).

Payment: Where one of the signers of a note on which was entry showing that after maturity it was paid by him brought action against other signer, alleging that he signed as accommodation indorser for defendant and did not receive any part of loan which was consideration recited in note, suit was not subject to demurrer on ground that it appeared that note had been paid; under allegations plaintiff, being merely a surety, was, on payment of note, subrogated to payee's rights against the principal. 23 App. 713 (1) (99 S. E. 239).

ARTICLE 2.

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§ 3542. (§ 2970.) **Effect of release.**

Misrepresentation: Where cropper delivered cotton to his landlord, surety on his note, to sell and apply proceeds in payment thereof, and the payee induced the surety to apply such pro-

ceeds on the cropper's individual note by misrepresenting to him that he was bound on such note also, surety was not released. 13 App. 390 (79 S. E. 239).

§ 3543. (§ 2971.) **A change of contract.**

Stated. 13 App. 502 (1) (79 S. E. 375).

Arbitration: Supplemental contract providing for submission to arbitration of any disputed question as to what constituted extras, did not discharge surety, though original contract provided that payments for extras should be made monthly. 142/499, 501 (8) (83 S. E. 210).

Benefit: Fact that change in contract made without knowledge or consent of surety inured to benefit of principal and surety does not change rule. 13 App. 502 (2) (79 S. E. 375).

Consent: Novation of nature or terms of contract, made without consent of surety thereon, works a discharge of the surety. 21 App. 87 (2) (94 S. E. 56, 40 A. B. Rep. 453).

Note: Indulgence or extension of time of payment of note granted without consideration does not discharge surety or an indorser on such note. 13 App. 412 (2) (79 S. E. 227).

If new note be accepted by payee or indorsee, in renewal and consideration of note previously given, after consent of surety, the latter would be discharged. Id. 412 (3).

Where principal debtor, at assured's request, after extension of note, delivers property to assured to protect him, this may constitute ratification of extension. 17 App. 229 (1) (86 S. E. 456).

Where assured pleads release through unauthorized extension of time, evidence that he accepted property from principal debtor after such extension is admissible. Id.

Extension of time will not discharge assured unless there be not only agreement for extension, but indulgence extended for definite period fixed by agreement. Id. 229 (3).

It was error to strike plea of indorser of note that, without his knowledge or consent, payee, whose executrix was suing on the note, extended

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time of maturity, for valuable consideration consisting of payment in full of interest to date to which note was extended. 22 App. 558 (3) (96 S. E. 444). See 149/72 (99 S. E. 121).

Notice: Contract of service stipulating that it may be terminated upon certain notice was superseded by verbal new agreement at lesser sum for service,

§ 3544. (§ 2972.) **Of risk.**

Stated. 19 App. 725 (2) (92 S. E. 296); 22 App. 210 (1) (95 S. E. 720).

Agreement: Promise by holder of note to surety without consideration that he will proceed forthwith against principal debtor alone, being void, does not affect the surety's obligation. 142/814 (1) (83 S. E. 952).

Where surety is induced by void agreement made by holder of note to forego any means of protection, he will be discharged to extent of loss therefrom. *Id.*

Where creditor entered into agreement with principal debtor, who communicated terms of agreement to another person to induce him to become surety on notes to creditor, and facts were such as to authorize finding, in suit on notes, that creditor contemplated that terms of agreement would be communicated to surety for purpose of inducing him to sign notes, it was competent for surety to show agreement between creditor and principal debtor, that knowledge of agreement was communicated to him, that he became surety because of agreement, and that agreement was breached by creditor. 19 App. 725 (1) (92 S. E. 296).

Where surety is assured by holder of note that suit will be brought to the next term of court, and because of such assurance he foregoes means of indemnity and protection, and such suit is not brought, he will be discharged to extent of resulting loss. 22 App. 96 (1-a) (95 S. E. 315).

Agreement by creditor with principal debtor, made after debt has become due and without surety's consent, to forbear collection of debt for definite period, if without consideration, does not discharge surety; promise by principal debtor to pay interest upon debt

which did not give right to employer to terminate contract upon notice, but provided definite and specific duty and fixed definite compensation, and which was acted upon by both parties, payment being made and accepted thereunder. 22 App. 705 (1-a) (97 S. E. 106).

during time of forbearance forms no consideration for such forbearance, when debtor is already bound to pay such interest. 22 App. 235, 236 (1) (95 S. E. 717).

Collateral: Where promissory note contains recital of deposit of collateral security to secure payment of note and any other indebtedness of principal to payee which exists or may be contracted, sureties on note are not discharged because collateral is not actually deposited at time of execution of note, if subsequently it be deposited in accordance with stipulation in note and remain with pledgee. 146/51 (2) (90 S. E. 478).

Dismissal: When joint action is brought against principal and surety on joint and several promissory note, and plaintiff, by amendment, voluntarily dismisses his action against the principal, the surety is not thereby ipso facto discharged from liability. 19 App. 148 (2) (91 S. E. 235).

Dormant judgment: No defense as to surety in action on bond to stay collection of judgment, conditioned for payment of judgment in certain contingency, that judgment had become dormant during the time between happening of contingency and institution of suit. 142/297, 298 (5) (82 S. E. 902).

Fraud: Acts of principal debtor or of any other person than the creditor himself by which one is induced to become a surety, do not affect the rights of the creditor, even though the acts be fraudulent. 13 App. 153 (2) (78 S. E. 1024).

That fraudulent acts of third persons or agreements of which creditor had no knowledge when he accepted note, induced one to become a surety thereon, constitutes no defense to the

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creditor's action against the surety. Id. 153 (3).

Fraudulent representation: Plea in action against surety or accommodation indorser stating that when indorser signed note by reason of false statement then made, note had already been signed and delivered by principal and accepted by plaintiff, set up no defense. 21 App. 622 (3) (94 S. E. 915).

Indulgence or extension of time of payment of note granted without consideration does not discharge surety or an indorser on such note. 13 App. 412 (2) (79 S. E. 227).

Where principal debtor, at assured's request, after extension of note, delivers property to assured to protect him, this may constitute ratification of extension. 17 App. 229 (1) (86 S. E. 456).

Where assured pleads release through unauthorized extension of time, evidence that he accepted property from principal debtor after such extension is admissible. Id.

Extension of time will not discharge assured unless there be not only agreement for extension, but indulgence extended for definite period fixed by agreement. Id. 229 (3).

Where creditor on sufficient consideration extends time of payment of firm's debt without knowledge or consent of retiring partner, of whose retirement he knows, retiring partner is released from indebtedness assumed by continuing partner at time of retirement. 17 App. 385 (2) (87 S. E. 149).

Where indulgences to principal could have been ascertained by surety with slightest exercise of diligence before judgment was rendered against principal and surety, court did not abuse discretion in refusing to enjoin *fi. fa.* against the surety. 146/84 (90 S. E. 955).

Where A sold a house and lot to B, giving bond for title to vendee and taking notes for purchase price, and subsequently transferred notes to C, and vendee transferred bond for title to D, the last named assuming the debt, agreement upon part of holder of note, made with transferee of bond for valuable consideration, consisting in part of giving additional security, that time of payment should be extended,

does not convert B into a mere security; and agreement does not operate to release him as a security. 149/72 (1) (99 S. E. 121); 23 App. 724 (99 S. E. 387).

Where one sued on note signed by him as "security" filed plea admitting *prima facie* case, assumed burden of proof, and further pleaded that he was relieved from liability by reason of fact that time of payment was extended, for definite and named period and for valuable consideration paid by maker of note to payee and holder, and that this was done without his knowledge or consent, and supported plea by evidence, and plaintiff introduced no evidence, judge did not err in directing verdict for defendant. 20 App. 35, 36 (2) (92 S. E. 394).

Plea in action on note that joint defendant was merely surety, that he signed at request of other defendant and the payee, without reward or value, that he agreed with such joint defendant to extend time and use of his name as surety for one year after note was due, the note being one year past due, that he was never notified that note was past due and unpaid, or to pay it, that he told plaintiff that he would not stay upon the note after it became due, and plaintiff then promised to pay, etc., set up no valid defense. 20 App. 196 (92 S. E. 945).

Plea filed by certain indorsers, that they were discharged from liability, because, for value consideration, there was extension of time to one of their co-sureties, can not be sustained where such agreement was between original creditors and one of the co-sureties, and it is not pretended that any arrangement was made with the principal debtor, and evidence shows that no valuable consideration was paid, and no one of the sureties was released or compounded with. 20 App. 576 (4) (93 S. E. 173).

Where there is an agreement between the holder and the maker of notes to extend the time of payment, unless it be for definite period, even though for valuable consideration, surety will not be discharged from liability. 21 App. 284, 286 (94 S. E. 260).

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Where payee, under valid agreement with principal and without consent of surety, extends time of maturity as fixed by note, release of surety will result; but in order to discharge surety, not only must there be an agreement for the extension, but indulgence must be for definite period fixed by valid agreement. 23 App. 630 (1) (99 S. E. 151).

Where creditor had, for consideration, extended time of payment of note signed by surety, and in addition thereto had calculated, and undertook to and did collect, usurious interest from principal, and by reason of such payment did indulge principal debtor and extend payment of note, all of which was without knowledge or consent of surety, surety was discharged. 24 App. 651 (1) (101 S. E. 814).

Intent: Any act of creditor which increases risk of surety or exposes him to greater liability will discharge latter, whether act be done with intent to defraud him or not. 24 App. 743 (1) (102 S. E. 190).

Knowledge: Where one of two persons signing note apparently as joint principals sets up that he was in fact surety for the other, and claims discharge by reason of some act increasing his risk as surety, he must show that payee knew that he was surety at time of act in question. 23 App. 630 (2) (99 S. E. 151).

In action on note of defendant, payable to other defendants, petition alleging that note was "discounted or sold" by maker to plaintiff before maturity, where no fraud appeared, plea that original note was signed at request of maker, that defendant relied on his representations as to responsibility of another indorser, and that, prior to signing renewal note, other indorsers became insolvent, which fact, though proven to maker and plaintiff, was not disclosed to pleader, was properly stricken, as plaintiff was not bound to voluntarily furnish information as to solvency of other indorsers or sureties, to prevent renewal of note. 24 App. 400, 401 (2) (100 S. E. 758).

Mortgage: Where note was secured by mortgage on personal property, failure of creditor to have mortgage recorded,

in absence of showing that accommodation indorser was not injured, discharges his liability under this section. 144/703 (87 S. E. 1059).

Negligence: Delay of owner in furnishing verified statements to surety on contractor's bond, which specified that such statement should be furnished monthly, did not release surety, where it acknowledged receipt of statements without objecting to delay. 142/499, 501 (8) (83 S. E. 210).

Notice: In absence of notice to proceed, surety is not discharged by failure to issue execution on judgment obtained against principal. 18 App. 73 (4) (88 S. E. 918).

Payment: Withholding of money until adjustment of controversy between architect and contractor did not release surety, though original contract provided that payments should be made monthly on approval of architect. 142/499, 501 (8) (83 S. E. 210).

Where owner of building under construction made payments to contractor in excess of amount authorized by contract, and failed to require affidavits provided for therein, sureties on bond were discharged. 13 App. 516 (1) (79 S. E. 492).

Sureties on building contractor's bond were discharged, where obligees made payments without regard to progress of work, and made final payment prior to completion, thereby increasing their risk. 17 App. 542 (87 S. E. 826).

Usury: Accommodations indorsers—being mere sureties—on note in which there is waiver of homestead, and in which there is concealed usury, of which indorsers are ignorant at time of indorsement, are, in consequence of increased risk, discharged from liability on note; but if they know of usury, although it does not appear on face of note, they do not escape all liability, but may be relieved of usury upon proper plea. 146/51 (1) (90 S. E. 478).

Charge that "basis of defense is ignorance during any part of transaction; because if the indorser becomes aware of the usury in the contract, then his relation to the matter must be one of repudiation. * * * If he accepts it he is bound by it from the beginning upon the whole contract," was erroneous, language being open

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to construction that if indorsers learn of existence of usury subsequently to execution of note, they would be bound, unless they took steps to repudiate it and to disaffirm their liability on it. 146/51 (2) (90 S. E. 478).

Where usury is shown in note sued on, plaintiff must prove, in order to hold surety liable, that he signed note with knowledge of usury. 20 App. 496 (1-a) (93 S. E. 106).

Statement in 8 App. 804 (70 S. E. 182), that question whether defendant was ignorant of fact that usury was included in note which he signed as surety should have been submitted to jury was obiter dictum. 20 App. 496 (2) (93 S. E. 106).

§ 3546. (§ 2974.) Notice to sue.

Evidence: There was no pleading to authorize parol testimony that indorser made oral demand on officers of company to sue on note while principal was solvent, and that demand was followed by promise on part of plaintiff to do so and it failed to do so. 18 App. 217, 218 (2) (89 S. E. 174).

Where it does not appear that indorser parted with means of protecting himself in consequence of assurances by creditor to him, and record discloses nothing that would amount to estoppel as against plaintiff or would relieve indorser from necessity of complying with strict provisions of this section, court did not err in excluding parol testimony which would not have shown when alleged oral notice to sue was given by endorser—whether before or after maturity of debt—or precisely to whom such notice was given. 18 App. 217, 218 (3) (89 S. E. 174).

Letters: Court did not err in excluding letters relied upon as constituting notice referred to in this section, one of such letters being mailed to plaintiff before maturity of debt, and containing merely expression of desire on part of indorser that plaintiff would collect obligation when it became due, and other letter suggesting advisability of bringing suit and expressing doubt whether plaintiff could make money later if suit should be delayed, but given no notice to creditor to proceed

Plaintiff in suit against surety has burden, after proof of usury, to show that surety signed note with knowledge of usury. 23 App. 458 (2) (98 S. E. 361).

Surety on note secretly infected with usury, of which he had no knowledge, is discharged from liability if note contains waiver of homestead. 23 App. 458 (2) (98 S. E. 361).

Surety upon note in which there is waiver of homestead is discharged from liability when shown that at time he signed there existed secret agreement between payee and principal whereby latter was to receive and did receive usurious rate of interest. 23 App. 630 (1) (99 S. E. 151).

to collect same out of principal. 18 App. 217, 218 (1-a) (89 S. E. 174).

Parol notice or request to creditor to bring suit was not a compliance with this section or of itself sufficient to discharge surety. 142/814 (1-a) (83 S. E. 952.)

Petition in action on indemnity bond was not demurrable here for failure to set out facts which would have been essential had action been on accounts covered by bond and named in petition. 16 App. 693 (1) (85 S. E. 970).

Plea in action on note that joint defendant was merely surety, that he signed at request of other defendant and the payee, without reward or value, that he agreed with such joint defendant to extend time and use of his name as surety for one year after note was due, the note being one year past due, that he was never notified that note was past due and unpaid, or to pay it, that he told plaintiff that he would not stay upon the note after it became due, and plaintiff then promised to pay, etc., set up no valid defense. 20 App. 196 (92 S. E. 945).

Residence: Court did not err in excluding letters relied upon as constituting notice referred to in this section, where they did not comply with mandatory requirement that county of principal's residence should be stated. 18 App. 217 (1) (89 S. E. 147).

Rights of surety against principal.

Writing: Parol notice or request to creditor by surety upon note to bring suit will not operate as compliance with

this section, or of itself have effect to discharge surety. 22 App. 96 (1) (95 S. E. 315).

§ 3550. (§ 2978.) Judgment against surety.

Condemnation money: Bond given by defendants for payment of judgments which may be rendered in case will be treated as bond for eventual condemnation money. 22 App. 235, 236 (2) (95 S. E. 717).

Eventual condemnation money is that which is recovered in the identical case in which appeal is taken; it is the amount fixed and settled by the judgment or decree of the court in the case. 22 App. 235, 236 (2) (95 S. E. 717).

ARTICLE 3.

Rights of Surety Against Principal.

§ 3551. (§ 2979.) Process against principal.

Payment: Indorser need not pay notes, in order to have right to proceed to

have debt paid out of funds of maker. 145/336, 337 (1) (89 S. E. 216).

§ 3552. (§ 2980.) For money paid.

Defense: Contention that surety is not rightfully the holder of a note, against the maker of which the surety has brought action, or for some reason is not entitled to collect the same, is a defense which should be affirmatively pleaded. 13 App. 785 (80 S. E. 34).

Mortgage fi. fa. here properly amended in proceeding by surety to foreclose mortgage given to indemnify surety so as to credit mortgagor with sum paid by surety before due. 18 App. 300 (2) (89 S. E. 373).

Note: Where surety paid debt he was entitled to reimbursement, though payment was accomplished by paying renewal note. 144/74, 75 (3) (86 S. E. 249).

A surety, who has acquired title to a note by payment and delivery, may recover from the maker the full amount due thereon, including attorney's fees provided for therein. 13 App. 785 (80 S. E. 34).

§ 3553. (§ 2981.) Effect of judgment against surety.

Defense: Where suit was brought against surety after judgment had been obtained against principal, judgment was not conclusive as to liability of surety, but was only prima facie evidence thereof, and surety could set up any legal defense showing want of liability on part of principal. 24 App. 481 (2) (101 S. E. 129).

Joined: Holder of joint and several note may sue obligors jointly or severally, or sue any one of the signers alone; on such an obligation he may sue the principal and the surety jointly, or at his option he may sue either the principal or the surety alone. 21 App. 530 (3) (94 S. E. 850).

§ 3556. (§ 2984.) Proof of suretyship.

Stated. 140/554, 566 (79 S. E. 546); 17 App. 107 (86 S. E. 397); 22 App. 210 (2) (95 S. E. 720).

Cited. 20 App. 489, 490 (1) (93 S. E. 115).

Accommodation indorser: Where written assignment of note, signed by

payee, recites that for value received he transferred and assigned the note with full recourse on himself, payee was estopped from testifying that as matter of fact he was an accommodation indorser only. 20 App. 489 (1) (93 S. E. 115).

Rights of surety against principal.

Circumstantial evidence: Relationship may be shown by circumstances. 13 App. 38 (2) (78 S. E. 947).

Evidence: Where defendant had statutory right to prove by parol, before judgment, fact of her suretyship, and was deprived of such right by court directing joint verdict against her and her codefendant, without allowing her opportunity to sustain by proof allegation in her answer that she signed note sued upon as surety only, she was entitled to new trial. 24 App. 577 (2) (101 S. E. 586).

See **Opinion**.

Indorsers: Surety, sued as principal, upon contract on face of which suretyship does not appear, may, on proper notice to codefendant, sustain plea of suretyship by parol evidence. 13 App. 38 (1) (78 S. E. 947).

Joint maker: Where joint principals on joint note gave renewal note in lieu of such note, and without any additional consideration, such note would also be a joint note, and not one of security for another, unless it should appear that the principals agreed that one should be principal and other surety. 146/263 (1) (91 S. E. 21).

Promissory note reciting, "I promise to pay," and signed by two or more persons, is a joint and several obligation, irrespective of whether one or more of the signers may in fact be sureties. 21 App. 530 (2) (94 S. E. 850).

If two persons sign note apparently as joint principals, and there is nothing in it to show that one is surety for the other, presumption of law is that both are liable as joint principals; this presumption may be rebutted by

parol evidence or by circumstances, burden being upon one thus claiming suretyship to establish the fact. 23 App. 630 (2) (99 S. E. 151).

Notice: Before one sued as maker of note and who appears as such on face of note can avail himself of this section, he must give notice required and his plea must contain appropriate prayer for independent affirmative relief. 19 App. 434 (1) (91 S. E. 509).

In order that one who has signed promissory note apparently as principal may, prior to judgment, prove that he was merely a surety, plea setting up that fact and praying that judgment be molded accordingly must also show that previous notice had been given principal of surety's intention to make such proof. 21 App. 530 (1) (94 S. E. 850).

Opinion: Where relationship of a promisor to his payee is that of joint principal or that of surety is question to be determined by facts, and is not to be governed by opinion of either of the parties. 23 App. 630 (3) (99 S. E. 151).

Parol evidence admissible to show that persons signing as guarantors did so without independent consideration, and that contract was one of suretyship. 143/324 (1) (85 S. E. 126).

Presumption: While one signing note apparently as maker may show that he is surety, presumption is that his liability is truly evidenced by writing. 15 App. 458 (1) (83 S. E. 859).

That payee received all proceeds from transfer to innocent purchaser was insufficient to create inference that ostensible maker was only surety. *Id.*

§ 3557. (§ 2985.) After judgment.

Cited. 22 App. 92 (95 S. E. 380).

§ 3558. (§ 2986.) Control of fi. fa.

Cited. 145/452 (89 S. E. 409).

§ 3559. (§ 2987.) When sued separately.

Separate suit: Holder of joint and several note may sue obligors jointly or severally, or sue any one of the signers alone; on such an obligation he may sue the principal and the surety jointly, or at his option he may

sue either the principal or the surety alone. 21 App. 530 (3) (94 S. E. 850).

Surety may be sued separately from its principal. 22 App. 348 (2) (95 S. E. 1025).

Rights of sureties among themselves. Rights of sureties as to third persons.

§ 3561. (§ 2989.) **Contribution.**

Cited. 22 App. 92 (95 S. E. 380).

ARTICLE 4.

Rights of Sureties Among Themselves.

§ 3564. (§ 2992.) **Right of contribution.**

Joint action: Three of four sureties, who have paid the debt of their principal, may jointly sue their co-surety for contribution, founding their action up-

on the obligation containing the contract of suretyship. 141/95 (80 S. E. 554).

ARTICLE 5.

Rights of Sureties as to Third Persons.

§ 3567. (§ 2995.) **Subrogation.**

Limitations: Sureties suing a co-surety for contribution, founding their action upon the obligation containing the contract of suretyship, will have the same time within which to bring suit as a creditor would have had on the same instrument. 141/95 (80 S. E. 554).

Privity: Surety on bond here was not subrogated to rights of principal under certain receipt. 142/353 (82 S. E. 1076).

Rule: Subrogation arises only in those cases where party claiming it advances money to pay debt which, in event of default by debtor, he would be bound to pay, or where he has some interest to protect, or where he advances money under agreement express or implied, made either with debtor or creditors, that he shall be subrogated to rights and remedies of creditor. 146/641 (92 S. E. 58).

Surety who has paid debt of principal is subrogated in law and in equity to creditor's rights. 18 App. 387 (1) (89 S. E. 525).

Where there are successive sureties, the last surety is regarded as the primary one, and if he pays the debt of his principal, he has no right of

subrogation against preceding sureties. 21 App. 471 (1) (94 S. E. 589).

Where one of the signers of a note on which was entry showing that after maturity it was paid by him brought action against other signer, alleging that he signed as accommodation indorser for defendant and did not receive any part of loan which was consideration recited in note, suit was not subject to demurrer on ground that it appeared that note had been paid; under allegations plaintiff, being merely a surety, was, on payment of the note, subrogated to payee's rights against the principal. 23 App. 713 (1) (99 S. E. 239).

Venue: Creditor holding promissory note may sue maker and sureties in county of residence of either, and surety paying note succeeds to this right and may sue upon note either in county of residence of maker or in that of residence of co-surety, at his option. 18 App. 387 (3) (89 S. E. 525).

Volunteer: Indorsement of notes of railroad by stockholder and director for money to pay taxes on railroad was not such voluntary payment as would deprive him of equitable subrogation to claim for amount of taxes. 145/336, 337 (2) (89 S. E. 216).

Relations of principal and agent among themselves.

CHAPTER 15.

Of Principal and Agent.

ARTICLE 1.

Relations of Principal and Agent Among Themselves.

§ 3569. (§ 2997.) How it arises.

Cited. 144/275, 278 (87 S. E. 10).

Bank: Where tax collector at suggestion of and upon advice of bank cashier, in order to evade garnishment proceedings, in avoidance of which bank had an interest, left with cashier county funds under cashier's receipt reciting that funds were to be turned over to county treasurer, there was a deposit of the funds in the bank to the credit of the treasurer, and the bank became the agent of the tax collector to consummate the transfer. 20 App. 121 (2) (92 S. E. 759).

Judgment: Where owner of property conveys to another against whom there is valid outstanding judgment at time, for sole purpose of putting title in grantee so that he may sell or pledge property for purpose of raising money to pay over to owner, lien of judgment will not attach and make property subject as against claim duly filed by owner of equitable interest. 148/410 (1) (96 S. E. 872).

Negotiation: Mere fact that confidential agent, who exclusively negotiated to an agreement actual terms of sale of property of principal, had only authority to negotiate, and was not empowered to make binding contract, would not make him simply an intermediary or middleman. 22 App. 431 (1) (96 S. E. 232).

Pleading: Where, in action for price of fertilizer, defendant admitted in open court that it was bought from a cer-

tain person, as plaintiff's agent, to whom payment was made, injection into case by court in his charge of issue as to whether or not defendant paid purchase price to such person as agent of plaintiff, was not erroneous, although pleadings did not raise the issue of agency; it was not incumbent upon defendant to recast his plea in this particular. 23 App. 189 (1) (98 S. E. 105).

Power: Generally one may convey to another authority to perform, at any time in future, act in his behalf. 15 App. 663 (2) (84 S. E. 147).

Proof of agency: Evidence of agency was admissible where defendant pleaded payment to plaintiff's agent by check. 15 App. 275 (82 S. E. 907).

Proof of agency and of nature of agency may be shown by showing circumstances, apparent relations, and conduct of parties. 18 App. 24 (2) (88 S. E. 747).

Sale: Where owner of property engages another to find purchaser and to negotiate terms of sale, and such person, with or without compensation, assumes such duty, and procures purchaser, and owner consummates contract of sale upon terms arrived at solely by virtue of previous negotiations thus had, relation which subsists between seller and one acting for him is that of principal and agent. 22 App. 431 (1) (96 S. E. 232).

§ 3570. (§ 2998.) Words of description.

Stated. 140/326, 330 (78 S. E. 912).

Administrator: Executory contract between party, administrator of estate of named person, and another party, whereby former agreed to sell to latter certain personal property exceeding fifty dollars in value, and to lease for

turpentine purposes certain real estate of intestate, was agreement by such party in his representative capacity. 145/616 (3) (89 S. E. 689).

Where administrator deposits funds of estate in bank of good standing which subsequently fails, and funds

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are thereby lost, he is *prima facie* liable, unless funds were deposited in name of administrator of particular estate to which funds belonged; where fund is deposited in name of administrator merely as administrator, he is *prima facie* individually liable for loss of the money. 19 App. 74 (90 S. E. 973).

Estoppel: Allegations of petition that defendant trust company contracted in representative capacity estopped plaintiff from denying that contract was made in such capacity. 143/214 (1) (84 S. E. 538).

Guardian: Legal title to bank stock purchased by and issued to W., "guardian," was *prima facie* in him individually, and on his death descended to his personal representative; his successor in the trust had no right, under facts of this case, to recover from the bank money paid for the stock. 22 App. 656 (2) (97 S. E. 249).

Indorsement: Abbreviation and letters "Treas." and "V. P.," following names, respectively, of two indorsers on note, are mere words of description, and imposed personal obligation on indorsers. 14 App. 729 (1) (82 S. E. 314).

Judgment: Default judgment against three persons individually on a note was not void, as not authorized by the pleadings, though petition showed that their signatures were followed by words describing them as trustees. 143/513 (1) (85 S. E. 708).

Library trustees: Payees in note made to them as library trustees, may maintain action on note in their own names, and the words "library trustees," added to their names in the petition will be treated as words of description and surplusage. 145/768 (1) (79 S. E. 480).

President: Recovery may be had against corporation upon obligation signed by one describing himself as "president," upon proof that parties understood that it was obligation of corporation, and that corporation received consideration and either authorized execution of contract or ratified it. 13 App. 504 (1) (79 S. E. 480).

Suit: Where the name of one sued was followed by the word "executor" of a named person, and such defendant

filed a plea as executor, and joined in a bill of exceptions and in executing a supersedeas bond, injunction will not be granted, after affirmance of the judgment, to restrain execution of writ of possession, on ground that judgment only bound such defendant individually. 140/326 (1) (78 S. E. 912).

Suit by or against one with the word "administrator," or "executor," added to his name, especially on a contract made by him, will ordinarily be treated as being his individual suit. Id. 326, 330.

Plaintiff in action against defendants as individuals could not recover on contract alleged to have been made in representative capacity. 143/214 (2) (84 S. E. 538).

Where plaintiff sues in his individual capacity, and title to damaged property is alleged to be in him, an amendment merely adding the words "as administrator of" a named person will not entitle him to recover as administrator, where neither the petition nor the amendment alleges that the title was in the decedent named, and that such person is dead, and that plaintiff is his administrator. 13 App. 744 (79 S. E. 946).

Agreement by F. C. M., administrator of the estate of E. P. M. to sell personal property affords no basis of recovery in suit against F. C. M. individually and heirs of E. P. M. 145/616 (3) (89 S. E. 689).

Petition here in action against defendant as executor, and seeking judgment against him as such, generally against the estate of testator, and specially against certain land described in a deed executed by such executor, for money loaned to operate farms of the estate, set out cause of action, and it was erroneous to dismiss action on general demurrer. 147/444 (94 S. E. 556).

Declaration in short form against named individual, alleging that he is duly appointed administrator of named decedent, that defendant administrator is indebted to petitioner on note in stated sum, signed by decedent, copy of note being attached, and further alleging that defendant administrator is indebted to petitioner in stated sum

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on open account for goods purchased, copy of account being attached, is suit against defendant in representative character as administrator. 148/551 (1) (97 S. E. 541).

Trustee: Deed conveying realty to certain person as guardian of minors named created such person a trustee for the minors and trust estate in property described. 144/732 (1) (87 S. E. 1055).

Where mortgage on realty was signed "Trustees North Ga. Col. School (Seal). H. A. B. Cor. Sect. (Seal),"

it was erroneous to admit same in evidence on trial of claim to property, over timely objection that there was no evidence shown where H. A. B. had any authority to sign any mortgage, evidence failing to disclose any such authority. 149/479 (2) (100 S. E. 569).

Verdict in action against one as administrator for plaintiff against such defendant will be construed to be against defendant in his representative capacity. 148/551 (2) (97 S. E. 541).

§ 3571. (§ 2999.) What may be done by agent.

Admission made through agent, during existence and in pursuance of his power, is no less evidence against the principal than if made by the principal in person. 22 App. 433, 434 (5) (96 S. E. 269).

Choses in action: The general proposition that all choses in action arising upon contract and involving property rights may be assigned so as to vest title in assignee does not apply where contract involves relation of personal confidence, such as to show that party conferring rights must necessarily have intended them to be exercised only by him upon whom they were

actually conferred. 23 App. 290, 291 (5) (98 S. E. 224).

Performance: Where agreement in effect provides that service may be performed either by contracting party or by such other person as contract may be assigned to, in order that construction contrary to such express intent can as matter of law be inferred it must appear, from nature of contract, that performance of obligation by another would be essentially different in result from what had been contracted for. 23 App. 290, 291 (5) (98 S. E. 224).

§ 3572. (§ 3000.) Executors, etc., may convey by attorney in fact.

Consideration: Services performed by grantee as agent for executors in selling other land for them would constitute valuable consideration for deed for executors executed under power of attorney. 142/806 (2) (83 S. E. 941).

Presumption: Deed executed under power of attorney given by executor authorized by will to sell property was presumably valid under this section. 142/806 (2) (83 S. E. 941).

§ 3574. (§ 3002.) Agency created, how; agents of corporations.

Note: Agent of corporation authorized to close up another agent's account and take his note, was authorized to agree in writing that any subsequently discovered evidence that amount of note was incorrect could be used against the note, regardless of whether his authority to execute such agreement was in writing. 145/197 (1) (88 S. E. 820).

Law does not require that agent's authority to execute promissory note in name of principal shall be in writing. 18 App. 161, 162 (2) (89 S. E. 77).

Court did not err in disallowing amendatory plea offered by defendant, which alleged in substance that she had never signed notes sued upon, but that her name was signed to them by her husband, and that he had no written authority to do so. 18 App. 161, 162 (3) (89 S. E. 77).

Seal: Though power to execute sealed instrument must be under seal, injunction bond procured by attorney of record with knowledge of principal, and purporting to be signed by principal through the agent, under which injunction is obtained, is binding on

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principal, regardless of attorney's authority. 144/211 (1) (86 S. E. 1097).

Where one signs name of another on back of promissory note which as to principal debtors is sealed instrument, but which is not such an instrument as to surety whose name is signed thereon, because his signature is not

under seal, it is not necessary that authority to sign note be under seal; neither is it necessary that authority to sign note be in writing, and subsequent ratification of same is sufficient to bind surety. 24 App. 452 (2) (101 S. E. 131).

§ 3575. (§ 3003.) **Revocation.**

Broker: Authority to broker to obtain loan for borrower may be revoked at any time prior to finding of lender willing, able, and ready to make loan upon terms of agreement of borrower; such revocation cannot be made after notice to borrower by broker that he has procured lender ready, able, and willing to make loan upon security and terms agreed. 23 App. 271 (1-a) (97 S. E. 885).

Coupled with an interest: Where power is coupled with an interest in agent himself it is not revocable at will, and in all cases agent may recover from principal, for unreasonable revocation, any damages suffered by reason thereof. 23 App. 290, 291 (4) (98 S. E. 224).

Death of either principal or agent revokes the power. 23 App. 290, 291 (4) (98 S. E. 224).

New agent: Appointment of new agent for performance of same act revokes the power. 23 App. 290, 291 (4) (98 S. E. 224).

Renting agent: Interest of agent must lie in subject matter of agency and

not merely in profits which are to result from exercise of power; in the case of a renting agent, acting for owner of property, agent must have interest in contract of rental and not merely in contract of agency by virtue of which he is to be compensated for future services in collection of rents; work and expense of authorized agent in finding tenant and securing lease could be taken as sufficient to establish such an interest in the contract of rental. 23 App. 290, 291 (4) (98 S. E. 224).

Will: Where contract between life insurance company and agent provided that it might be terminated by either party at will, fact that company entered into a consolidation with another company did not constitute breach of contract of agency for which the agent could recover damages, on theory that company was prevented thereby from carrying out its agreement. 147/283 (93 S. E. 406).

Generally, agency is revocable at will of principal. 23 App. 290, 291 (4) (98 S. E. 224).

§ 3576. (§ 3004.) **Agent limited by his authority.**

Bail trover: Where there is nothing in petition to show that collection agent of defendant had authority to institute bail proceeding in name of his principal against the third person who never had possession, etc., of piano sold, and where proceeding was not to recover the piano, but maliciously, nor anything to show that the principal, with full knowledge of all material facts, ratified the act of the agent in instituting bail-trover proceeding, court did not err in sustaining demurrer to and dismissing the petition. 23 App. 655 (99 S. E. 136).

Bill of sale: Power of attorney to execute a mortgage and a lien on crops

is no authority for execution of a bill of sale conveying title to property for purpose of securing a debt, and this is true although power of attorney may contain the general expression, "to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises." 22 App. 740 (2) (97 S. E. 200).

Factor: Cotton factors, who had sold cotton in accordance with general usage to reimburse themselves for advances, not liable where they deemed security insufficient and customers had failed to deposit more margins. 17 App. 57 (1) (86 S. E. 256).

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Where factors have made advances, they are not bound to hold goods, if customer fails to deposit margins required. *Id.* 57 (2).

Instructions: Finding by auditor that at time money came into defendant's hands, he "knew that it was the wish and desire of his principal," the plaintiff, that the said sum should be paid over to a named person in payment of her note held by that person, and that defendant loaned the money without knowledge and consent of his principal, was equivalent of finding that defendant violated instructions of plaintiff. 20 App. 499 (1) (93 S. E. 153).

Pledging credit: Local agent of mercantile firm engaged in business of buying and selling goods for profit has no authority to pledge credit of his principal by buying goods in name of principal for accommodation of third person. 22 App. 325 (1) (95 S. E. 1019).

Agreement between local agent of mercantile firm and defendant for purchase of car of tomatoes in name of such firm for accommodation of de-

fendant was not binding on such firm, and defendant was not entitled to recover on his plea of set-off. 22 App. 325 (2) (95 S. E. 1019).

Power of attorney: Formal power of attorney is subject to strict construction; general terms in it are restricted to consistency with the controlling purpose, and will not extend the authority so as to add new and distinct powers different from special powers expressly delegated. 22 App. 740 (1) (97 S. E. 200).

General words in power of attorney must be construed with reference to specified objects to be accomplished, and limited to recitals made in regard thereto. 22 App. 740 (1-a) (97 S. E. 200).

Ratification: Motion to recommit case to auditor, in order that specific finding might be made on issue as to whether plaintiff ratified loan made by her agent, should have been granted here, although finding on such issue might be inferred from finding of amount due plaintiff by defendant. 20 App. 499 (2) (93 S. E. 153).

§ 3578. (§ 3006.) **Payment to agent failing to produce obligation.**

Cited. 145/408, 409 (89 S. E. 367).

Stated. 141/364 (1) (80 S. E. 999).

Authority: If debtor by promissory note makes payment thereof to one claiming to be agent for collection, it is incumbent on former to see that latter is in possession of security; for, if he is not, debtor will be liable to pay again, unless person making collection had authority to collect sums due his principal, or money actually reached the owner. 18 App. 611 (90 S. E. 171).

This section declares, in effect, that implication of authority to collect, which exists on part of an agent who produces evidence of debt, does not arise where debtor fails to require production of such obligation; but this provision of law does not preclude debtor from otherwise establishing such express or implied authority, nor from showing subsequent ratification of the act by the creditor as principal. 20 App. 221 (1) (92 S. E. 1015).

Where it is shown that payment to agent reaches hands of principal, or hands of another who is his authorized

agent to receive it, authority of person to whom money was actually paid need not be shown. 21 App. 200 (3) (93 S. E. 1009).

Where, in suit upon note, debtor shows that he paid part of it to supposed agent of holder, but failed to show that such agent produced note at time of payment or that money collected ever reached owner of note, or that alleged agent had specific authority to collect note, no valid defense of partial payment is shown. 23 App. 275 (97 S. E. 884).

Burden is on defendant claiming payment, in action on note, to prove that the person to whom he made the payment without production of the note had authority to collect the same. 141/364 (2) (80 S. E. 999).

Defense to action on note setting up payment to one authorized by the holder to collect for him casts upon defendant burden of showing not only that he has paid the money, but that he has made payment to a person authorized by the holder to receive it,

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or else that it actually reached the holder's hands. 13 App. 234 (1) (79 S. E. 35).

Where payment on written evidence of debt is made to person as agent for another, production of written evidence of debt raises implication of

his authority to receive payment as agent, but where it is not produced there is no such implication, and burden is upon person making payment to establish such authority. 21 App. 200 (1) (93 S. E. 1009).

§ 3580. (§ 3008.) Deposit by agent, bank failing.

Administrator: Where administrator deposits funds of estate in bank of good standing which subsequently fails, and funds are thereby lost, he is prima facie liable, unless funds were deposited in name of administrator of

particular estate to which funds belonged; where fund is deposited in name of administrator merely as administrator, he is prima facie individually liable for loss of the money. 19 App. 74 (90 S. E. 973).

§ 3581. (§ 3009.) Diligence of an agent.

Charge substantially in words of this section was sufficient. 19 App. 429, 430 (4) (91 S. E. 432).

It was not error, in absence of timely written request, for court to fail to charge that it was duty of plaintiff, a detective agency, in conducting investigation to murder, to act honestly and in good faith, and to deal honestly and in good faith with defendant. 19 App. 429, 430 (4) (91 S. E. 432).

Collection: Where bank receives for collection draft for definite sum, accompanied by warranty deed and letter of instructions authorizing delivery of deed to drawee upon payment of draft, it is duty of bank to adhere faithfully to instructions, unless modified by drawer, and delivery of deed and draft

upon payment of smaller sum, without further instructions and without consent of drawer, would make bank liable to drawer, and damages would be difference between amount called for in draft and amount actually received and remitted by bank. 24 App. 465 (101 S. E. 194).

Consideration: Rule that where mutual promises furnish only consideration they must be mutually binding was inapplicable where theory of case was that defendant had agreed to render services as plaintiff's agent, and was grossly negligent, under this section, and not that there was no valuable consideration for the agreement. 143/431 (4) (85 S. E. 321).

§ 3582. (§ 3010.) Agent can not buy or sell for himself.

Cited and applied. 145/750, 757 (89 S. E. 1071).

Attorney at law, employed to sell property, cannot, directly or indirectly, become purchaser without principal's knowledge and consent. 140/101 (2) (78 S. E. 717).

Dual agency: Contracts of dual agency are void only when duality was not known to each party. 16 App. 149 (1) (84 S. E. 597).

The first duty of an agent is that of loyalty to his trust; he must not put himself in relations which are antagonistic to that of his principal; his duty and interest must not be allowed to conflict. 22 App. 431 (2) (96 S. E. 232).

An agent is not permitted to compromise himself by attempting to serve two masters having a contrary interest, unless it be that such contracts of dual agency are known to each of the principals; immaterial that fraud by agent was not actually intended, or that no injury was in fact occasioned to the principal. 22 App. 431 (2) (96 S. E. 232).

Good faith of agent is no defense. 140/101, 105 (78 S. E. 717).

Insurance: Agent of fire insurance company authorized to contract for insurance cannot without company's consent become agent of property owner who desires insurance, since mutual

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agency requires consent of both parties. 145/239 (1) (88 S. E. 967).

Where insurance agent contracted with property owner to represent him in procuring insurance from company agent represented, such contract, based on double agency, was void, and did not render agent liable for failure to procure insurance. *Id.* 239, 240 (3).

Rescission of sale: Equity requires that on repudiation of a sale to agent, the principal must do equity by returning

the purchase money and restoring the status. 140/101, 106 (78 S. E. 717).

Sale: Agent to sell is not, without consent of principal, authorized to make sales in foreign markets under arrangement whereby agent should assume all risks and contingencies of loss and take all the prongs. 247 Fed. 618 (1).

Third person: Section applies as well where agent joins with a stranger, who has knowledge of agency, as where agent is sole purchaser. 140/101 (2) (78 S. E. 717).

§ 3583. (§ 3011.) **Personal profit.**

Fraud: Agent to buy and resell property cannot lawfully make secret profit from transactions; nor is it necessary to application of rule that principal must show actual or moral fraud. 145/750, 751 (6) (89 S. E. 1071).

Guaranty: Where sole consideration of undisclosed promise of buyer to agent of seller was agent's guaranty of his principal's contract, which agreement lay wholly beyond scope of agency, it can not be said as matter of law that interest of agent in negotiating terms of sale could have been affected thereby. 22 App. 431, 432 (3) (96 S. E. 232).

§ 3586. (§ 3014.) **Commission and expenses.**

Dual agency: Where duality of real estate agency is relied on as defense to agent's action, defendant must prove, not only duality of agency, but that same was not known to both parties. 16 App. 149 (1) (84 S. E. 597).

Where property owner, with knowledge of custom of real estate agents to charge both parties commissions on exchange of property, allows broker to render services, and remains silent, broker may recover commission from him. 17 App. 292, 293 (2) (86 S. E. 660).

Defendant cannot by demurrer to petition avail himself of defense of dual agency on part of plaintiff, where it does not appear from petition that the inconsistent relationship was unknown to him. 19 App. 425 (1) (91 S. E. 510).

Pleading: Petition here to recover amount received by real estate agent on sale of plaintiff's land and concealed from plaintiff set forth cause of action. 145/406, 407 (1) (89 S. E. 363).

Sale: Agent, gratuitous or otherwise, who has been entrusted with authority to negotiate terms of sale for his principal, is not permitted to receive from buyer secret profit, and if he does receive such a profit, contract negotiated is not binding upon his principal; question is whether or not such secret payment could be taken as consideration for any act on agent's part within scope of his agency. 22 App. 431 (2) (96 S. E. 232).

Evidence: Under evidence in action for money alleged to be due under written contract by which defendants agreed to pay plaintiff sum stated to obtain certain loan for them on certain land, court erred in directing verdict for plaintiff. 19 App. 813 (92 S. E. 286).

Interference: Principal can not, with knowledge of negotiations between purchaser and his agent, and while negotiations are pending, defeat right of agent to commission by interfering with and himself completing sale of which agent was procuring cause. 23 App. 46, 47 (3) (97 S. E. 443).

Loan: Broker employed to obtain loan must not only find person who is ready, able, and willing to make loan on terms on which borrower has contracted to take it, but he must either tender the money or produce person willing to make loan on terms agreed, unless bor-

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rower, at time broker advises him that he has such a person ready, able, and willing to make loan, refuses to accept loan. 23 App. 271 (1) (97 S. E. 885).

Pleading: Amendment here to petition set forth cause of action for renewal commissions earned, due, and unpaid at time of filing of suit, and court erred in dismissing it upon general demurrer. 149/248 (99 S. E. 856).

Petition here in action by salesman to recover commissions on sales did not set out cause of action, and judge erred

in overruling oral motion to dismiss it. 24 App. 229 (100 S. E. 452).

Profits: Where sales agent, without consent of principal, sold goods in foreign market under arrangement whereby he was to assume any loss incurred and to take the profits, such agent, having violated his agreement, is not entitled to any commissions, but principal is entitled to all profits, subject to no deduction for commissions. 247 Fed. 618 (2).

§ 3587. (§ 3015.) **Broker's right to commission.**

Stated. 140/719 (1) (79 S. E. 775); 16 App. 43 (5) (84 S. E. 494).

Acceptance: Where broker contracted with another to procure purchaser of certain stock, on terms which, on being first submitted to such other, should be declared acceptable to him, stipulated commission was not earned where broker submitted to such other offer of purchase, whereby it was proposed that stock be exchanged for certain real estate, and such offer was declined, and only acceptance shown was based upon condition that broker should receive his compensation from the purchaser. 19 App. 704 (1) (91 S. E. 1068).

Carrying out contract: Where it is not claimed that plaintiff broker consented to rescission of contract of sale, only questions to be considered are whether he was employed, has performed services, and has not received compensation. 15 App. 254 (82 S. E. 914).

Where defendant had voluntarily, without broker's consent, released purchaser, refusal of purchaser to buy property was not available as defense. *Id.*

Where real estate broker's contract entitles him to commission only if sale is closed, he is not entitled to commission where purchaser declines to complete sale. 16 App. 569 (1) (85 S. E. 767).

Charge: Petition alleging that at time of breach of alleged brokerage contract there had been no revocation of the agency, and this allegation being denied in defendant's answer, not error to refuse to charge that "there is no plea of revocation filed in this case, and that kind of defense is not

before you for consideration." 140/353 (1) (78 S. E. 1005).

Consummated: Broker entitled to commission if he was procuring cause of sale, though sale was actually consummated by owner. 13 App. 22 (78 S. E. 681).

Contract: Letter here was not on its face authority to real estate agents to sell land for certain amount, and though accepted by an entry on the back did not bind writer to pay commission. 140/74 (1) (78 S. E. 410).

In sales broker's action for commissions on sale of listed property all legal testimony tending to show that there was no agreement in same sense between parties as to alleged contract of listment would be admissible. 24 App. 467, 468 (4) (101 S. E. 303).

Where alleged parol contract which formed basis of suit, brought by real estate agent for commissions, did not by its terms fix precise length of time for its duration, and was otherwise too vague, indefinite, and uncertain to indicate conditions under which defendant empowered agent to sell the property, court erred in overruling demurrer to petition, as it set forth no cause of action. 18 App. 321 (89 S. E. 381).

Estoppel: In action on note conditioned on consummation of sale of defendant's land for \$450, where defendant showed that when note was signed plaintiff delivered to defendant a \$500 bond to make purchase go through, and that defendant held bond and collected interest thereon until he received entire purchase price, and that purchase price was paid to defendant, after which defendant turned bond over to purchaser,

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he could not dispute claim, and verdict for plaintiff was properly directed. 24 App. 595 (101 S. E. 758).

Evidence making out a case of contract to convey to plaintiff for a certain amount in cash, leaving him to retain for himself any greater sum which he might receive from another purchaser, does not correspond with allegation that an agency was created, with compensation to be measured by amount in excess of the sum shown by such proof for which he could sell the property for the owner. 140/719 (3) (79 S. E. 775).

Letter, written to purchaser by defendant's attorneys on her behalf, and stating they were willing to call matter off, was admissible in action for commissions. 15 App. 254 (82 S. E. 914).

Where solvency of purchaser's broker was not in issue evidence that they did not return any property for taxation was properly excluded as immaterial. *Id.*

Where defendant signed contract of sale before contract was called off by mutual agreement, evidence of purchaser's plans for subdividing property properly excluded as immaterial. *Id.*

Letter from purchaser to defendant's attorneys, containing propositions for resale, and stating that salesmen of broker made certain representations was properly excluded as irrelevant. *Id.*

Where, in action to recover alleged definite sums as commissions for sale of personalty, evidence excluded, if admitted, would not have been sufficient, within itself or in connection with other evidence in case, to show contract between vendor and vendee to pay the selling agent a definite amount as commissions, there was no error in rejecting the evidence and granting nonsuit. 148/23 (95 S. E. 679).

Where suit was brought on express contract for commissions for a fixed amount, it was error, warranting grant of new trial, for court, over proper and timely objections, to allow evidence that services of plaintiffs in procuring purchaser for property was reasonably worth certain sum, and that usual com-

mission allowed real estate agents was five per cent. 21 App. 563 (2) (94 S. E. 835).

Testimony of defendant that plaintiff (a broker suing for commission) "told me that M., [the would-be purchaser] was ready to take the property on the terms stated; * * * I knew that M. was able to pay for the property," which testimony was corroborated by testimony of broker and of the would-be purchaser was sufficient to sustain verdict for plaintiff as against motion for new trial on general grounds. 23 App. 577 (1) (99 S. E. 60).

Where, in action against corporation to recover commissions, based upon alleged oral agreement, by terms of which general manager of corporation agreed to pay plaintiff for her services in selling its entire plant, evidence failed to show that manager had been authorized by corporation to sell its stock or its entire physical property, or that corporation subsequently ratified unauthorized act of manager in agreeing to pay plaintiff, court did not err in directing verdict for defendant. 23 App. 671 (99 S. E. 150).

In sales broker's action for commissions based on contract of listment, wherein answer amounted only to denial, charge that defendant was only required to prove defense to jury's satisfaction was incorrect, as in such case burden does not shift, and jury was not bound to divide evidence and determine relief provisionally by one of the parts only, but they might consider all the evidence, burden of proof meanwhile remaining where pleadings originally placed it. 24 App. 467, 468 (5) (101 S. E. 303).

Fraud: Where undisputed evidence in suit on contract to pay real estate agent's commissions showed that defendant, by slightest inquiry of tenants of property involved, could have discovered falsity of innocently made representations of plaintiff in regard to renting value of property, defense of constructive or legal fraud was insufficient in law. 18 App. 768 (1) (90 S. E. 652).

Interference: Evidence here sustained finding that consummation of sale was delayed solely for seller's conven-

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ience, and finally defeated by his actions. 15 App. 735 (2) (84 S. E. 201).

Joint: Broker's commissions are earned when, during agency, he finds purchaser ready, able and willing to buy on terms stipulated by joint owners of property. 17 App. 689 (1) (87 S. E. 1094).

Petition here did not state cause of action, where it showed that defendant was not sole owner, as plaintiff knew, that no sale was consummated, and that defendant had not represented that he was other owner's agent, or that he agreed to sell. Id. 689 (2).

Jury: Where real estate broker alleged that agency had not been revoked and defendant denied such allegation, and both sides introduced evidence on the issue, it was proper to submit it to the jury. 140/353 (1) (78 S. E. 1005).

Where plaintiffs contended that they were entitled to commissions irrespective of whether goods were ever delivered, and defendant contended that it had special contract with plaintiffs, under which latter were to receive commissions on such goods only as were delivered to former, and there was evidence to support each contention, and it was not clear what was actual understanding and intention of parties, question should have been submitted to the jury, and court erred in directing verdict in favor of plaintiffs. 20 App. 776 (2) (93 S. E. 422).

New contract: Where vendor accepted purchaser and deeded property to him and placed him in possession, taking notes for price, broker was entitled to commission regardless of purchaser's solvency and subsequent dealings between him and vendor. 17 App. 493 (1) (87 S. E. 717).

Option: This section applies where purchaser procured by a broker first buys an option to purchase, and, within life of option, exercises his option by electing to purchase and gives timely and unconditional notice thereof to other party; in such case broker's right to commissions does not ripen into cause of action until option has been actually exercised. 24 App. 210 (2) (100 S. E. 714).

Owner selling: Placing of property in real estate broker's hands to sell will prevent owner from selling only when

it is so agreed. 142/12 (2) (82 S. E. 225); 17 App. 689 (1) (87 S. E. 1094).

In order for broker to earn commission on account of sale of property, he must either have sold it or been procuring cause of sale; owner may sell property, and if he does not use broker's labor to help in sale, he owes broker nothing, but if purchaser procured by broker buys from owner, even at less price than given broker, owner would be liable if broker's effort was procuring cause of sale. 24 App. 645 (1) (101 S. E. 775).

Part performance: Where there was no partial performance by real estate agents of contract which was without consideration, owner could revoke agency at any time before consummation of sale. 17 App. 677 (2) (87 S. E. 1099).

Petition here in broker's action for breach of contract was sufficient, independent of defective allegation, to state cause of action. 142/12 (2) (82 S. E. 225).

Petition here in action by broker against secretary and treasurer of corporation for services in disposing of corporation property, which defendant was alleged to have withdrawn from plaintiff's hands in order to prevent him from receiving any compensation, held not to state cause of action. 21 App. 175 (94 S. E. 89).

Where petition in action by sales broker set up cause of action based upon contract of listment, and no special objections were entered and preserved setting up insufficiency of averments as to plaintiff's contract with defendant, and averments as actually made authorized admission of plaintiff's evidence establishing contract and defendant's breach, petition was sufficient. 24 App. 467 (101 S. E. 303).

Procuring cause: Allegation that plaintiffs, as brokers, had effected trade for near-beer saloon at 170 E. Avenue, not supported by proof that plaintiffs had procured a purchaser willing, ready, and able to buy, provided the business of selling near-beer at that place was not, upon re-establishment of zone within which such business could legitimately be conducted, excluded from such zone, when evidence showed that

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170 E. Avenue was not within the zone after re-establishment of the district where such business would be lawful. 140/342 (78 S. E. 1068).

Real estate broker not entitled to commission on sale unless option secured resulted in securing purchaser ready, able, and willing to buy. 16 App. 38 (84 S. E. 492).

Where broker contracted with owner of stock to procure purchaser, on terms which, on being first submitted to such owner, should be declared acceptable to him, nonsuit in action for stipulated commission was properly awarded upon its being shown that broker submitted offer of purchase, whereby it was proposed that stock be exchanged for certain real estate, and such offer was declined, though owner may have subsequently effected an exchange through different persons, where it further appeared that such broker had not been given exclusive sale of such stock. 19 App. 704, 705 (2) (91 S. E. 1068).

Where jury might find that plaintiff was procuring cause of a sale, and defendant, when sale was being closed, said to plaintiff that he would treat him right about it, defendant's motion for new trial, after judgment for plaintiff, was properly denied. 24 App. 251 (100 S. E. 654).

Purchase of land: Broker employed to purchase land is as much entitled to compensation as when employed to sell, though it is agreed that portion of price shall be paid in land. 15 App. 205 (1) (82 S. E. 813).

Quantum meruit: Charge that if jury came to conclusion that there was no certain and definite contract or agreement between the parties, they would be authorized to find for plaintiff on quantum meruit, provided he rendered valuable services to defendant, though unauthorized by pleadings and evidence in case, was not harmful to defendant where jury returned verdict for full amount sued for under contract. 20 App. 234 (1) (92 S. E. 952).

Refusal: Where broker holding option to buy land, including timber thereon, transfers same by contract binding transferee to pay commission for procuring option, fact that owner subsequently declines to make conveyance

including the timber, and that transferee accepts deed excluding the same, will not affect broker's right to commission. 13 App. 396 (79 S. E. 243).

Registration, prerequisite to recovery of commissions: See §§ 971, 978, catchword **Commissions**.

Sale: Broker has made "sale," when through his influence person ready, able and willing to buy on terms proposed is brought to principal, though through principal's fault no sale is consummated. 15 App. 735 (1) (84 S. E. 201).

Tax, payment as prerequisite to recovery of commissions: See §§ 971, 978, catchword, **Commissions**.

Tender: Where broker has found purchaser ready, willing, and able to buy, etc., and the owner refused to carry out the trade, not generally necessary, in order for broker to recover commissions, that proposed purchaser should make to the proposed vendor an actual tender of the purchase-price. 140/719 (1) (79 S. E. 775).

Terms: Where, under terms of listment contract with sales broker, \$2,000 was to be paid in cash and balance on terms to be agreed on between purchaser and principal, latter can not complain that there was a variance in authorized terms because purchaser offered entire amount in cash, where principal refused absolutely to sell. 24 App. 467 (3) (101 S. E. 303).

Where owner listed real estate with broker for sale, and broker failed to procure purchaser upon terms of owner, but did procure one who entered into direct contract with owner on different terms, part of consideration being conveyance to owner by purchaser of a lot, which contract was not consummated, by reason of inability of purchaser to convey lot, because he had no title and could not obtain one, purchaser was not "ready, willing and able" to buy upon terms agreed upon by him with the owner, and broker did not earn any commission. 24 App. 600 (1) (101 S. E. 713).

Time: Where contract authorized plaintiff to effect sale of land for defendant to certain third person, and fixed certain date as time limit within which plaintiff should "make, complete, and execute the aforesaid sale," agreement

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effected three days before expiration of time limit, providing that owner should make, execute and deliver bonds for title to said third person, and that latter should make, execute and deliver to defendant notes and mortgages within thirty days from delivery of abstracts of title, there was variance between contract authorized and one effected, and owner was not bound. 23 App. 353 (98 S. E. 186).

Where it does not appear from petition in suit for commission on sale of land that plaintiff procured purchaser

ready, able, and willing to buy at stipulated price, or that during life of contract there was such interference by defendant as to prevent sale, or any collusion, etc., to delay consummation of trade until after expiration of contract, petition is subject to general demurrer, even though it alleges that immediately after expiration of contract (time being of the essence) defendant sold property to one who had been negotiating with plaintiff. 23 App. 578 (99 S. E. 47).

§ 3588. (§ 3016.) **Suit on breach of contract.**

Actually rendered services: Where plaintiff rendered services under contract to engage in securing power contracts, he is entitled to compensation agreed on, though not successful. 17 App. 55, 56 (7) (85 S. E. 498).

Bank cashiers: Under the national bank act cashiers of national banks hold office subject to dismissal at pleasure of board of directors. 23 App. 441 (2) (98 S. E. 402).

Where national bank cashier was elected for fixed time, and was dismissed prior to expiration of period for which employed, he can not recover salary for unexpired period, even though dismissed without cause. 23 App. 441 (2-a) (98 S. E. 402).

Bankruptcy: Executory contract of employment of agent, which contains stipulation that part of his commissions on sales shall be applied in payment of pre-existing debt due to principal, does not remain in effect after agent's discharge in bankruptcy from such previous indebtedness, so that its continued compliance could be thereafter enforced; but so long as parties, by subsequent acquiescence in its terms and performance of its conditions, elect to treat the contract as still subsisting, they are bound by its provisions. 21 App. 87 (1) (94 S. E. 56, 40 A. B. Rep. 453).

Charge: Where, in action for wrongful discharge, defendants allege incompetency of plaintiff, refusal to charge that if servant either negligently or for want of capacity made mistakes about business, resulting in damage, employers would have right to dis-

charge him, was reversible error. 145/219, 220 (3) (88 S. E. 941).

Competency: In contract for personal services, competency of employee, unless otherwise expressed, imports nothing more than reasonable skill. 145/219, 220 (2-a) (88 S. E. 941).

Competitor in business: Where one employed for definite time becomes secretly engaged in business which necessarily renders him competitor and rival of employer, he has interest against his duty, and may be summarily dismissed; such dismissal employee can not recover from employer upon allegation that latter violated terms of employment by discharging him without cause and without notice. 24 App. 652 (101 S. E. 811).

Disrespectful language constitutes sufficient grounds for discharge of employees; whether language was sufficiently disrespectful to authorize discharge, and whether there was sufficient provocation by employer to excuse such language, was for jury. 16 App. 106 (2) (84 S. E. 598).

Evidence, in suit on contract of employment, that plaintiff gave his time in accordance with contract was admissible. 17 App. 55, 56 (4) (85 S. E. 498).

Evidence of methods of work of plaintiff's successor was immaterial. Id. 55, 56 (5).

Where, in action by discharged employee for breach of contract of service, it appears that plaintiff had been employed for the previous year, testimony that prior to that time he had had no experience in line of em-

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ployment is admissible to illustrate reasonableness of defendants' contention as to terms of contract. 145/219 (1) (88 S. E. 941).

Court did not err in refusing to require plaintiff, while being examined as witness, to state how much salary he had been paid by former employer. 19 App. 269 (2) (91 S. E. 286).

Inefficiency: If overseer, either negligently or for want of capacity, makes mistakes about his master's business detrimental to master's interest, master may discharge him; but if he be competent to discharge duties and is not negligent, it is no ground to discharge him merely because he is unable to control some laborers whom he is employed to superintend. 145/219 (2) (88 S. E. 941).

Judgment: Declaration alleging that plaintiff and defendant entered into written contract of employment for one year at salary payable weekly, that plaintiff was wrongfully discharged, that he was ready, able and willing to perform the services, but defendant wrongfully breached the contract, and which prayed for damages for part of the term of employment, but not subject to plea in abatement or bar which alleged judgment in prior suit for breach of same contract, etc., where it appeared that former suit was for only part of salary which would have been earned for designated period, salary for time covered by first suit being expressly excluded in second suit. 20 App. 404 (2) (93 S. E. 324).

Measure of damages for breach of executory contract of employment is the actual loss sustained. 143/101 (3) (84 S. E. 465).

Discharged employee can not recover, in action brought before expiration of term, value of services for entire term, though he was willing to perform remainder of services. 16 App. 567 (2) (85 S. E. 790).

Petition alleging that plaintiff contracted to work as bookkeeper and saleslady from March, 1911, until January 1, 1912, at and for a certain price per month, sufficiently alleged a contract of employment. 142/146 (1) (82 S. E. 564).

Allegations that pending term of employment master ordered servant to

leave, and on being reminded of the contract, threatened to put her out of the building, and made a motion towards her as if to execute the threat, sufficiently alleged a discharge. Id. 146, 147 (2).

Demurrer was properly sustained here to petition in action for alleged breach of contract of employment, upon grounds that no cause of action was set forth, that petition showed that plaintiff was not employed for term of one year, and that contract was subject to terminate at will of either party. 18 App. 535 (89 S. E. 1048).

Quantum meruit: Where there was no allegation and no evidence that term of service had expired and that plaintiff was suing for wages or for any special injury for breach of contract, proper to submit case on theory that plaintiff relied on quantum meruit. 142/194 (1) (82 S. E. 551).

Separate actions: One who claims breach of contract of employment for a year, and alleges wrongful discharge $4\frac{1}{2}$ months before conclusion of term, and after the year brings an action for the half of the salary for the month for which he was paid half, is estopped to sue for the salary for the succeeding 4 months. 13 App. 253, 254 (4) (79 S. E. 496).

Subsequent contract: Where, after defendant had notified plaintiff of latter's discharge from employment, the parties entered into agreement in nature of compromise that plaintiff would be given thirty days' notice and allowed to work another month before discharge, and defendant wrongfully discharged plaintiff before expiration of thirty days and without paying salary for the month, plaintiff was entitled to hold defendant to original contract, which was for one year, to recover whole year's salary, less amount paid, and whatever he had been able to earn after discharge, exercising ordinary diligence to find employment. 19 App. 269 (4) (91 S. E. 286).

Sue immediately: Where employee is wrongfully discharged he may sue immediately for any special injury sustained. 143/101 (1) (84 S. E. 465).

Termination at will: Where contract between life insurance company and

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agent provided that it might be terminated by either party at will, fact that company entered into a consolidation with another company did not constitute breach of contract of agency for which the agent could recover damages, on theory that company was prevented thereby from carrying out its agreement. 147/283 (93 S. E. 406).

Three remedies: Where relation of landlord and cropper exists, and landlord wrongfully refuses to perform contract, cropper has three courses of procedure open: (1) If landlord's breach consists solely of refusal to furnish

articles which may be obtained elsewhere, cropper may obtain them, complete contract as contemplated, and hold landlord and landlord's share of crop responsible for actual damages resulting; or (2) cropper may sue immediately for his special injuries, if any, including value of services rendered; or (3) he may wait until expiration of harvest season and sue for full value of his share of crop or what his share would reasonably have been under faithful performance of contract by both parties. 22 App. 284 (1) (96 S. E. 16).

§ 3591. (§ 3019.) **Effect of ratification.**

Accepting: If principal, with full knowledge of all material facts, accepts and retains benefits of unauthorized acts of an assumed agent, he will ordinarily become bound thereby. 22 App. 538 (3) (96 S. E. 397).

Assumption of authority: Principle of law which requires that in order for unauthorized act to be capable of ratification, one who performed act must have purported to act in name of and on behalf of the principal, can not be invoked by plaintiff here, it appearing that parties assumed such authority. 20 App. 221 (2) (92 S. E. 1015).

Doctrine of ratification is not applicable against person as to an act of one who did not assume to act in his name or under authority from him. 23 App. 297 (2) (97 S. E. 891).

Attorney: Where in suit against purchaser of personal property, instituted by third party to enforce lien arising prior to sale, purchaser vouched seller into court to defend title, by notifying latter's attorney of pendency of suit, if seller was not thereby properly vouched into court because attorney did not represent him, yet, if attorney with seller's authority, defended suit, though apparently representing purchaser, such defense by seller is ratification of acts of attorney, and seller will be considered as having been vouched into court by purchaser. 24 App. 737 (3) (102 S. E. 178).

Corporation: Where president, without authority, executes in behalf of the corporation a contract, and the corpo-

ration retains and uses the consideration furnished by the other party, it can not repudiate the contract. 13 App. 504 (2) (79 S. E. 480).

Evidence: Where, in suit on forthcoming bond in claim case, defendant named as obligor files plea of non est factum, denying that person signing bond as agent was authorized to so act, plaintiff must carry burden of proof by establishing authority of one thus acting as agent to bind his principal; such proof may be supplied by showing ratification by principal of act of agent, and, if shown, ratification will relate back to act ratified. 22 App. 538 (2) (96 S. E. 397).

Implied: Act of agent in selling article for his principal may be ratified by principal, even if agent was unauthorized in first place to make sale, and such ratification may be implied from acts or silence of principal. 19 App. 21, 22 (5) (90 S. E. 1037).

Jury: It was question of fact for jury under evidence here whether defendant's husband was her agent and acting within scope of authority in transferring note sued on to plaintiff, and whether defendant ratified transfer as made, and direction of verdict in favor of defendant was error. 148/487 (2) (97 S. E. 69).

Whether or not ratification of agent's act has resulted is usually question of fact, to be determined by jury, and not question of law for court. 22 App. 538 (3) (96 S. E. 397).

Where there was evidence that after

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execution of forthcoming bond in claim case, obligor proceeded to sell for its own benefit the property embraced in the claim, it was erroneous to exclude evidence offered for purpose of showing that person conducting sale on behalf of obligor was previously notified of pendency of claim proceedings, and was shown bond purporting to have been given by defendant therein, and issue as to whether or not defendant thus ratified act of its assumed agent is execution of bond, by receiving with knowledge a benefit thereunder, should have been submitted to jury. 22 App. 538 (4) (96 S. E. 397).

Sale: Principal can not receive and hold proceeds of sale by agent and at same time attack authority of agent to sell. 140/306 (2-a) (78 S. E. 1064).

Act of son of defendant in purchase of automobile was ratified by defendant who paid storage bill to garage company with which seller had stored the car, and who took the car to his home and subsequently sold same to a third person without notice to original seller; defendant thereby made himself liable for balance of pur-

chase price. 22 App. 209 (95 S. E. 733).

Fact that seller, after buyer had apprised him of unauthorized agreement entered into by traveling salesman, proceeded to sell and furnish to buyer another consignment, would not have effect of ratifying terms of original unauthorized agreement, it appearing also that at time subsequent sale was made, seller repudiated agreement in question and shipped additional articles without any agreement that repudiated promise of agent would be recognized. 23 App. 255 (2) (98 S. E. 100).

Silence: Ratification will be inferred where agent has notified principal by letter of his act and principal has not repudiated it within reasonable time. 19 App. 21, 22 (5) (90 S. E. 1037).

Time: Where principal is informed by his agent of what he has done, principal must express dissatisfaction within reasonable time, otherwise his assent to his agent's acts will be presumed. 19 App. 21, 22 (5) (90 S. E. 1037).

ARTICLE 2.

Rights and Liabilities of Principal as to Third Persons.

§ 3593. (§ 3021.) Principal, how far bound.

Cited. 21 App. 295, 296 (94 S. E. 276).

Charge on agency was authorized here in action on note, wherein defendant alleged payment to plaintiff's agent. 15 App. 275 (82 S. E. 907).

Contract: Agent who, acting within scope of authority, enters into contract for principal whom he discloses, does not bind himself, in absence of express agreement to do so. 17 App. 49 (2) (86 S. E. 91).

Authority to agent to execute, in behalf of principal, definite, specified contract does not, without more, imply or include authority to enter into independent contracts, even though subject matter of latter contracts be related to, or the same as, that of contract in execution of which agent was em-

powered to act. 21 App. 373 (1) (94 S. E. 646).

Corporations, responsibility of, for acts of officers and agents: See § 2225 and notes.

Estoppel: Where principal, by holding person out as agent, induces another to deal with him as agent, he is estopped to deny agent's apparent authority. 15 App. 275 (82 S. E. 907).

Where one holds out another as his agent, and by his course of dealing indicates that agent has certain authority, and thus induces third person to deal with his agent as such, he is estopped to deny that the agent has any authority which, as reasonably deducible from conduct of parties, agent apparently has. 24 App. 540 (4) (101 S. E. 699).

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Evidence of a transaction by a purported agent was admissible, when accompanied by evidence of ratification by the principal. 141/429 (1) (81 S. E. 225).

Where verdict in action on guaranty necessarily depended upon allowance of certain credits, and evidence failed to show that such credits were authorized, overruling motion for new trial was error. 23 App. 251 (3) (98 S. E. 228).

Lease: Where renting agent, acting for owner of property, enters into contract of lease with tenant, he may not engraft thereon, without consent of owner, stipulations relating to mutual obligations arising out of contract between agent and owner, so as to bind latter. 23 App. 290 (1) (98 S. E. 224).

Where, at instance of agent and without practice of any fraud, owner of property, with actual knowledge that stipulations relating to mutual obligations arising out of contract of lease with tenant, enters his own indorsement upon contract as signed by agent and by him presented to owner for approval, stipulations referred to become mutually binding upon both agent and owner as agreement arrived at by and between them. 23 App. 290 (2) (98 S. E. 224).

Note: It was not error to refuse to allow defendant in action on several promissory notes to amend his pleadings by adding plea alleging that after death of payee of notes (which were for purchase price of land) "a man by the name of Walker," "representing the estate of the decedent," or "appearing to represent" the decedent, obtained from defendant a mortgage to secure one of the notes, under agreement that he would carry out agreement of decedent to build house on land, and failed to do so, and that "the consideration for said transaction has wholly failed." 20 App. 88 (5) (92 S. E. 545).

Where agent, in transacting business for his principal, takes note payable to himself instead of to the principal, and thereafter indorses and delivers it to his principal, latter stands upon no better footing for any purpose than if named in the note as payee. 22 App. 433, 434 (6) (96 S. E. 269).

Personal covenant: Petition did not state cause of action for breach of personal covenant where it did not show that person purporting to sign contract as agent was authorized to bind defendant. 143/214 (3) (84 S. E. 538).

Proof: Agent's authority need not be proved by express contract, but may be established by principal's conduct and course of dealing. 15 App. 275 (82 S. E. 907).

Ratification: A purported principal is not bound by the acts of one assuming without authority to act as his agent, unless he ratifies such acts. 141/429 (1) (81 S. E. 225).

Principal can not ratify so much of contract as operates in its favor to repudiate obligation assumed in its behalf by persons claiming to act as agent. 13 App. 504 (2) (79 S. E. 480).

Where suit on contract contains averment that agent was duly authorized to sign for another, if evidence shows that person sought to be charged ratified act of signing with knowledge of material facts, this will not constitute such variance as to prevent recovery, if plaintiff is otherwise entitled thereto. 145/836 (2) (90 S. E. 61).

Where, before maturity of note, unauthorized agent, purporting to act in name of payee, collects for later entire amount owing on note, and creditor, with full knowledge of transaction, accepts portion of proceeds and consents that person making collection may use remainder for few days, creditor will be held to have ratified collection in toto. 20 App. 221 (3) (92 S. E. 1015).

Merchant whose agent purchases goods on credit is liable for their purchase price, where he receives and retains the goods and accepts benefit of contract, whether or not agent had authority to make purchase. 24 App. 540, 541 (5) (101 S. E. 699).

Sale: Where agent authorized to sell corporate stock only for cash, without authority employed another agent, who made the sale, collected the proceeds, deducted a portion for his services, and remitted balance to first agent, who paid none of it to the corporation, purchaser of stock, upon first agent's refusal to deliver, was entitled

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to recover from him the amount he received, but not the sum retained by the second agent. 13 App. 288 (5) (79 S. E. 162).

Agent authorized to sell mules has authority to agree with purchaser that if mule which appears to be sick does not recover seller will repay purchase-money. 14 App. 215 (2) (80 S. E. 680).

Act of son of defendant in purchase of automobile was ratified by defendant who paid storage bill to garage company with which seller had stored the car, and who took the car to his home and subsequently sold same to a third person without notice to original seller; defendant thereby made himself liable for balance of purchase price. 22 App. 209 (95 S. E. 733).

Sheriff: Where less than amount of exe-

cution is received from one of the joint defendants therein, under agreement, made or authorized by plaintiff that payment thus received shall relieve that defendant from further liability, agreement will discharge other defendants; but such an agreement by a sheriff, made without authority from plaintiff will not have that effect. 23 App. 297 (1) (97 S. E. 891).

Warehousemen: Agreements of agent in charge of warehouse, when within scope of his authority, are binding on warehouse company, under sections 3593, 3595, 3598, 3606. 144/598, 599 (4) (87 S. E. 804).

Warranty: Salesman employed to buy and sell horses was authorized to warrant soundness of horses and to bind his principal by such warranty. 143/44 (2) (83 S. E. 116).

§ 3594. (§ 3022.) Forms immaterial.

Administrator: Executory contract between party, administrator of estate of named person, and another party, whereby former agreed to sell to latter certain personal property exceeding fifty dollars in value, and to lease for turpentine purposes certain real estate of intestate, was agreement by such party in his representative capacity. 145/616 (3) (89 S. E. 689).

Evidence: Where written agreement by F. C. M., administrator of the estate of E. P. M., to sell personal property is relied on as basis of recovery, erroneous to admit in evidence paper executed by heirs at law of intestate, purporting to constitute F. C. M. their attorney in fact. 145/616, 617 (3-b) (89 S. E. 689).

§ 3595. (§ 3023.) Extent of authority.

Bank: Under agreed statement of facts authorizing judge to find that defendant bank had right to assume that draft drawn on it by former cashier of another bank, but who had been removed as cashier a few days before draft was drawn, was drawn before he was removed as cashier and, without further inquiry, to pay it as an authorized draft of such other bank, court did not err in finding in favor of defendant. 20 App. 236 (92 S. E. 953).

Draft: Agent's authority to draw draft upon principal may be established by conduct and course of business of principal. 14 App. 88 (1) (80 S. E. 302).

Estoppel: Principal is estopped to deny that agent has authority which, as reasonably deducible from principal's conduct, agent apparently possesses. 14 App. 88 (1) (80 S. E. 302).

Where shipper accepts contract of affreightment made in his behalf by another, and sues for its breach, he can not challenge authority of person who made contract in his behalf. 14 App. 93 (2) (80 S. E. 211).

Evidence here showed that contract relied on, if entered into at all by an alleged agent for the principal, was made without authority. 141/329 (2) (80 S. E. 996).

Where evidence was insufficient to authorize inference that buyer knew that salesman was special agent without authority to make warranty, salesman's testimony as to his authority was properly excluded. 143/44 (3) (84 S. E. 116).

General agent: General agency exists where there is a delegation of authority to do all acts in connection with a particular trade or business, and

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in such a case principal is bound by acts of agent within scope of authority. 24 App. 540 (1) (101 S. E. 699).

Whenever general agency has been established, all persons who have dealt with agent have right to assume that his authority to deal with them continues, unless notice has been conveyed to them that agency has been revoked. 24 App. 540 (2) (101 S. E. 699).

Indorsement: Power of agent to make or indorse commercial paper must be strictly limited. 14 App. 88, 90 (80 S. E. 302).

Jury: Where proof was sufficient to authorize finding that there was general agency, question as to whether plaintiff should have made further inquiry as to specific authority of agent was for jury. 18 App. 24 (3) (88 S. E. 747).

Lease: Agent in general charge of principal's business may make binding contract of rental for 12 months, though not authorized in writing and employed only by month. 15 App. 657, 658 (3) (84 S. E. 174).

Payment: In order for payment to plaintiff's agent to constitute defense, not essential that plaintiff should have known thereof. 15 App. 275 (82 S. E. 907).

Pleading: Petition here as amended clearly presented issue as to whether defendants, by their course of dealing, so held out their agent as one having authority that plaintiff was justified in believing that limitations on authority had been withdrawn. 14 App. 88, 91 (2) (80 S. E. 302).

Presumption: Cotton factor's agent authorized to solicit shipments of cotton to his principal is presumptively authorized to make terms under which cotton shall be shipped, received, stored, sold and handled by the principal. 13 App. 425 (2) (79 S. E. 912).

Private instructions: Persons dealing with general manager or overseer of plantation are not bound by private instructions given him by owner, but owner is bound by contracts of his general agent, acting in conduct of principal's business and within apparent scope of authority. 18 App. 24 (2) (88 S. E. 747).

Charge that agent's authority would be construed to include all necessary and usual means for effectually executing it, and that private instructions and limitations not known to persons dealing with general agent can not effect them, was not erroneous. 19 App. 42, 43 (3) (90 S. E. 984).

Where purchase of goods by agent for principal was authorized by latter, and goods were accepted and used by latter, mere fact that principal had privately told agent not to make such purchase, for stated reason that seller had already refused credit, can not be properly accounted as such material variation from agent's authority as would relieve principal from payment for such goods. 24 App. 458 (101 S. E. 193).

Private instructions or limitations not known to persons dealing with general agent are not binding upon such persons. 24 App. 540 (3) (101 S. E. 699).

Railroad: Where ticket agent of railroad company, while acting within apparent scope of authority, negotiates with prospective passenger for transportation and for sleeping car berths on train regularly affording such service, passenger may rely upon agent's apparent authority, and is not required to communicate with principal and verify agent's actual authority. 19 App. 536 (4) (91 S. E. 1047).

Sale: Agency to sell does not necessarily include right to give instructions in regard to use of article sold. 15 App. 107 (2) (82 S. E. 665).

Under contract here local agent of seller of fruit could not waive liability for full price of fruit ordered. 145/635 (89 S. E. 717).

If person was authorized agent of seller of goods to make sales thereof and to sign contract of sale for his principal, and he signed such contract in his own name as salesman, this would be binding on principal. 145/836, 837 (9) (90 S. E. 61).

Though it be shown that special agent had authority as such to effect fully consummated sale of certain property, no authority arises therefrom of continuing authority whereby at date long subsequent to date of sale he would be authorized to make

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independent and supplemental agreement relating to same subject matter. 19 App. 401 (3) (91 S. E. 579).

Scope of authority: Authority to agent to do a thing generally includes authority to do everything necessary for accomplishment of main object. 18 App. 24 (2) (88 S. E. 747).

Seal: Though power to execute sealed instrument must be under seal, injunction bond procured by attorney of record with knowledge of principal, and purporting to be signed by principal through the agent under which injunction is obtained, is binding on principal, regardless of attorney's authority. 144/211 (1) (86 S. E. 1097).

Where one signs name of another on back of promissory note which as to principal debtors is sealed instrument, but which is not such an instrument as to surety whose name is signed thereon, because his signature is not under seal, it is not necessary that authority to sign note be under seal; neither is it necessary that authority to sign note be in writing, and subsequent ratification of same is sufficient to bind surety. 24 App. 452 (2) (101 S. E. 131).

Special agent: Though under this section person dealing with special agent must examine his authority to do particular act, this does not prevent principal from waiving right to object to agent's want of authority. 14 App. 88, 91 (80 S. E. 302).

It is immaterial that insurance company procured sister of insured to sign "release" of policy, where she was agent of insured for sole purpose of paying premium due upon the policy, and having no authority to sign a release, she being neither the insured nor the beneficiary. 18 App. 494, 495 (4) (89 S. S. 633).

§ 3596. (§ 3024.) Failing to disclose principal.

Bank: Where officers of bank obtained loan from another bank on notes signed by them as individuals, and, at their request proceeds were credited to their bank, which thereafter became insolvent, it was not liable on such notes. 146/799 (92 S. E. 525).

Seal: Rule that undisclosed principal shall stand liable for contract of his

Where one holds another out as his special agent, principal is bound by agent's apparent authority to do particular thing thus authorized, as well as to do any and all things usual and necessary, and to employ all usual and necessary means that may be reasonably required, in the due, proper, and ordinary performance of the particular purpose of the appointment. 23 App. 255 (1) (98 S. E. 100).

Person dealing with special agent takes risk as to any extension of agent's authority beyond that which is thus authorized, and burden rests upon him to show authority from principal for any acts other than such usual and ordinary acts as are reasonably necessary to due performance of particular purpose of agency. 23 App. 255 (1) (98 S. E. 100).

If special agent exceeds scope of his authority as pertaining to any of the material elements of the transaction, principal is not bound. 24 App. 458 (101 S. E. 193).

Traveling salesman: Where it is not shown that collateral contract made by purchaser with traveling salesman was a usual and necessary incident to the sale, or that salesman had authority to make such contract, it was not binding upon principal. 23 App. 255 (2) (98 S. E. 100).

Warehousemen: Agreements of agent in charge of warehouse, when within scope of his authority, are binding on warehouse company, under sections 3593, 3595, 3598, 3606. 144/598, 599 (4) (87 S. E. 804).

Writing: Where agent's authority is conferred and defined in writing, scope or extent of such authority must be determined from terms of writing, and is to be determined and construed by the court. 18 App. 446 (2) (89 S. E. 535).

agent has no application to contract under seal. 24 App. 780 (1) (102 S. E. 457).

Settlement: Third person dealing with agent of undisclosed principal can not hold principal liable under contract, where principal has previously accounted and settled with agent. 19 App. 264 (1) (91 S. E. 283).

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Wife: Mere fact that wife may be owner of one or more cows which feed upon provender furnished solely upon credit of husband will not render her liable for value of such foodstuff, nor authorize judgment against her for same,

on theory that she was concealed principal of her husband, when there is no evidence that he was in any way acting as her agent when purchase was made. 24 App. 296 (1) (100 S. E. 647).

§ 3598. (§ 3026.) Representations by agent.

Sale: Agent authorized to sell mules has authority to agree with purchaser that if mule which appears to be sick does not recover seller will repay purchase-money. 14 App. 215 (2) (80 S. E. 680).

No estoppel on part of plaintiffs to claim title to mare in question resulted from conduct or statement of employee who, when person in possession of mare under plaintiff's contract of conditional sale was offering to sell it

to a subsequent purchaser, answered inquiry of latter as to whether it was any good by saying it was a good horse and advising him to buy it. 19 App. 600 (2) (91 S. E. 920).

Warehousemen: Agreements of agent in charge of warehouse, when within scope of his authority, are binding on warehouse company, under sections 3593, 3595, 3598, 3606. 144/598, 599 (4) (87 S. E. 804).

§ 3599. (§ 3027.) Notice to.

Acknowledge: When notice of fact is communicated to agent in absolute charge, knowledge of all facts suggested by notice is imputable to principal. 15 App. 786 (4-b) (84 S. E. 219).

Bankruptcy: Where cashier of bank had actual knowledge of bankruptcy proceedings, and had accepted such notice as true, and generally discussed the fact with others in ample time to have proved his debt against the bankrupt, debt to bank was discharged. 21 App. 453 (94 S. E. 649, 40 A. B. Rep. 764).

Charge: Where more complete statement of rule that notice to agent is notice to principal is not requested, error can not be predicated thereon. 144/16, 17 (6) (85 S. E. 1012).

Corporation is ordinarily presumed to have notice of any fact disclosed to agent authorized to act for it, but notice to corporate officer dealing in his own behalf or with others in contracting with corporation is not notice to corporation. 16 App. 802 (86 S. E. 391).

Knowledge of president of corporation is imputable to the corporation. 13 App. 504 (2) (79 S. E. 480).

Where vendor of personalty subscribed for all the capital stock of vendee corporation in payment, and transferred such stock to others, in thus dealing with the corporation he

was acting in his own interest as opposed to that of the corporation, and his knowledge as to misrepresentations and breach of contract by him would not be imputed to corporation. 145/730, 731 (3) (89 S. E. 822).

Corporation is not to be charged with notice of facts of which its president acquires knowledge while dealing in his private capacity and in his own behalf with third person; nor is knowledge on his part thus acquired imputable to corporation when, acting through another official, it deals with him at arm's length as with any other individual representing himself alone. 22 App. 397 (2) (95 S. E. 1002).

Fraud: Fact that agent of dowress was also administrator of estate, did not prevent application of rule that principal is bound by agent's knowledge while acting within scope of authority. 144/587, 588 (3) (87 S. E. 799).

Insurance: Knowledge of insurance company's agent or his clerk that insured merely held possession and bond for title constituted constructive notice to the company and estopped it from denying validity of policy. 144/306 (3) (87 S. E. 1).

Expression "constructive notice," in last paragraph, not used in strict sense, but as meaning that knowledge of agent at time of issuance of

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policy would be imputed to his principal. 145/716 (2-a) (89 S. E. 817).

Lender: One who let mortgagee have money to complete purchase at foreclosure sale, taking deed and executing title bond, was chargeable with notice of facts invalidating sale. 221 Fed. 736, 737 (5).

Partnership: Where, after dissolution of partnership, former member of firm, on being offered goods for sale by traveling salesman for dealer who before dissolution sold goods to firm, tells salesman that he is no longer member of the firm, this is notice of the dissolu-

tion to the dealer represented by the salesman. 21 App. 576 (94 S. E. 820).

Wife: Knowledge of attorney for mortgagee of third person's interest was imputable to his wife, for whom he, as agent, bought in the land on sale under execution issued in suit on note secured by mortgage. 147/787, 788 (4) (95 S. E. 689).

Whether attorney who had knowledge of third person's claim to land at time he acted as agent of his wife in purchase thereof still had knowledge was question for jury here. 147/787, 788 (4) (95 S. E. 689).

§ 3601. (§ 3029.) Principal bound for neglect and fraud.

Cited. 19 App. 264 (2) (91 S. E. 283).

§ 3603. (§ 3031.) Trespass of agent.

Corporations: Where agent of corporation selling commercial products manufactured by it committed unprovoked assault and battery upon plaintiff, plaintiff could not maintain suit for damages against corporation, although it knew that agent was person of violent temper, and in fact had employed him knowing that he was man prone to make unprovoked attacks upon others, it not appearing that corporation authorized the assault. 145/561 (1) (89 S. E. 704).

Homicide: Petition alleging that defendant fair association let a concession, and that on refusal of concessionaire to change his location on order of defendant's manager, latter struck him

with iron instrument and killed him, without provocation or justification, and wantonly and unlawfully, and within scope of employment, and to force deceased to change his location, not showing except by way of conclusion that it was done by defendant's command or assent or within scope of its business was subject to general demurrer. 24 App. 707 (102 S. E. 32).

Malicious prosecution: Where it is alleged in suit for malicious prosecution that prosecution was instituted by agent of defendant, it must be proved that agent was acting within scope of employment or at direction or command of his principal. 21 App. 634 (94 S. E. 814).

§ 3604. (§ 3032.) Benefit of contract to principal.

Concealed agency: When agent making contract for principal conceals fact that he is agent, contracting as if he were principal, principal may at any time appear in his true character and claim all benefits of contract from other contracting party, so far as he can do so without injury to that other by substitution of himself for his agent. 24 App. 731 (1) (102 S. E. 183).

Contract: Principal may sue for breach of written contract made by agent, where instrument discloses on its face that agent was contracting as such, but fails to disclose name of principal. 144/89 (1) (86 S. E. 225).

Cotton: Where ginner delivers to warehouseman as agent to collect certain charges a number of bales of cotton, and attaches to each bale tag showing charges due him, and warehouseman, without collecting same, delivers cotton to purchasers, together with warehouse receipt containing statement of charges, and it was universal custom in such community for owner of cotton so stored, or holder of receipts, to pay ginning charges when cotton was sold or removed from warehouse, which custom was well known to purchasers, right of recovery of such charges on

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part of ginner was disclosed. 24 App. 731 (3) (102 S. E. 183).

Defenses: Where agency is concealed, party dealing with agent may set up any defense against principal which he might have had against agent. 16 App. 706 (3) (86 S. E. 49).

Title: Where plaintiff parted with cot-

ton receipts under agreement that cotton should be returned following day, and its agent thereafter conveyed cotton to defendant in substitution for cotton received by them from defendant, he having no knowledge of agency, he acquired good title to cotton. 16 App. 706 (2) (86 S. E. 49).

§ 3606. (§ 3034.) **Agent is competent witness.**

Admissions: Where evidence of an admission is competent the admission must be adopted as a whole. 13 App. 174, 175 (3) (78 S. E. 1111).

Where issue is whether master knowingly employed or retained incompetent servant, it is not error to allow witness to testify as to admissions of such incompetency made by master's alter ego prior to occasion in controversy. 21 App. 603 (6) (94 S. E. 855).

Check purporting to have been given to alleged principal, and account of sale accompanying check, were admissible to show agency, where part of *res gestae*. 17 App. 127, 128 (5) (86 S. E. 407).

Corporation: Declaration of agent was inadmissible where agent was not shown to have authority to bind corporation. 143/516 (2) (85 S. E. 635).

Declaration, being hearsay as to individual defendant, improperly admitted. *Id.*

Evidence that person was authorized to sign replevy bond for corporation not competent evidence that he had authority to admit corporation's liability for tort. *Id.* 516 (3).

Declarations by defendant company's foreman in charge of work in which plaintiff was engaged when injured, to effect that injury was due to breaking of certain chain, and that he "had been after the company" for a year to furnish new chains and it would not do so, were not admissible in favor of plaintiff as admissions made by an alter ego of defendant. 24 App. 722 (2) (102 S. E. 184).

Report by operating agents of railway company to superintendent of transportation, made for purpose of being submitted to company's counsel to enable counsel to prepare for defense of defendant if litigation should arise

out of occurrence, which report was duly transmitted to such counsel, constitutes privileged communication; this is true although report might have been made at time so nearly contemporaneous with transaction itself as might ordinarily permit its being received as part of the *res gestae* thereof. 21 App. 453, 454 (2) (94 S. E. 584).

Where attorney of seller represented seller upon notification by purchaser of pendency of suit to establish lien upon property, and was acting under seller's authority, it was not error to admit in evidence declarations made by such attorney as to fact of agency, or as to other matters relative thereto, made at time of such notice or during pendency of litigation. 24 App. 737 (5) (102 S. E. 178).

Insurance: Not error to exclude from evidence letter purporting to have been written by medical examiner of insurance company, containing certain admissions against company, without other evidence to show agency and that admissions were made within scope of his agency. 141/773 (2) (82 S. E. 134).

Written statement by defendant insurance company's agent, since deceased, after loss, to effect that when policy was issued he knew that insured held only bond for title to insured property was inadmissible. 144/306 (4) (87 S. E. 1).

Knowledge: Although admissions of agent, made outside scope of employment and while not engaged in business of principal, are not admissible against principal as proof of facts admitted, yet if there is any other evidence before the jury sufficient to authorize finding that facts thus indicated actually existed, admissions may be proved to show knowledge of such

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facts on part of agent. 21 App. 603 (5) (94 S. E. 855).

Pre-existing law: Section is declaratory of law in force before adoption of Code. 13 App. 174, 177 (78 S. E. 1111).

Proof of agency: Evidence of defendant's admissions that he was acting as agent of his wife while they lived on certain land held admissible here. 142/395 (2) (83 S. E. 92).

Agency can not be proven so as to bind the alleged principal by testimony of statements of alleged agent. *Id.*

Declarations by one, made at time he purchased guano, that he was making the purchase for his wife, were admissible on the issue whether purchase was made by husband as agent of wife. 13 App. 837, 839 (80 S. E. 1051).

Alleged agent is not incompetent to testify to existence of agency. 15 App. 786 (4-a) (84 S. E. 219).

Witness here was competent to testify that he was defendant's agent and authorized to act for her. *Id.* 786 (6).

Agency cannot be proved by testimony of sayings of alleged agent, though made *dum fervet opus*. 147/329 (3) (93 S. E. 895).

Declarations of alleged agent are insufficient to establish agency and authority to collect payments on note. 18 App. 611 (90 S. E. 171).

It was not error to exclude testimony of defendant that certain third person told him, in reference to one of several notes sued on, that if defendant "could secure the note," that person "would fix the house," in absence of evidence that such person was an agent authorized to make this statement, the statement itself not being sufficient evidence of agency. 20 App. 88 (3) (92 S. E. 545).

Agency can not be proved by declaration of another agent of same principal, made to witness, unless it appears that latter agent was authorized by principal to make the declaration, or that it was made as part of *res gestae* in performance of some duty appertaining to his agency. 20 App. 733, 734 (4) (93 S. E. 280).

While agency can not be established by declarations or conduct of alleged agent alone, still fact of agency may

be established by proof of circumstances and apparent relations and conduct of the parties, including declarations of alleged principal. 21 App. 40 (1-a) (93 S. E. 558).

Declarations of alleged agent are not by themselves admissible to prove agency, but fact of agency may be established by proof of circumstances, apparent relations, and conduct of parties. 21 App. 200 (2) (93 S. E. 1009).

Where extraneous circumstances, independently of and without regard to declarations of agent himself, clearly tend to establish agency, his declarations, though inadmissible if standing alone, may, as part of the *res gestae* of the transaction, be considered. 21 App. 200 (2) (93 S. E. 1009).

While declarations of agent are incompetent to prove agency, yet, where there is testimony otherwise to establish such fact, such declarations may be admitted as corroborative of such testimony. 24 App. 737 (5) (102 S. E. 178).

See *Res gestae*.

Railroad: Testimony of plaintiff in action for injuries from falling into trestle when he alighted to set switch, that he overheard conductor say to third person that he had stopped the cab on the trestle, and that plaintiff would walk out and kill himself, was erroneously admitted. 141/645 (1) (81 S. E. 900).

Res gestae: Before agent's declarations are admissible, it must appear that declarant was agent at the time, and had authority to make them, or that they were part of *res gestae*. 142/663 (2) (83 S. E. 526).

Declaration of foreman that he knew tool which caused employee's injury was defective was inadmissible, unless so made as to be part of *res gestae*. 144/390 (2) (87 S. E. 397).

To bind a principal, declaration or admission of agent must be made *dum fervit opus*, and must be so closely connected with an act done in behalf of his principal which is within the scope of agency as to be free from suspicion of device or afterthought. 13 App. 174, 175 (2) (78 S. E. 1111).

Notwithstanding this section, declaration made by general manager

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concerning business was admissible to bind principal during agency, though referring to completed negotiations, and not part of *res gestae* thereof. 15 App. 815 (2) (84 S. E. 232).

Sayings of an agent are admissible against the principal only upon theory that they are part of the *res gestae*. 21 App. 453, 455 (94 S. E. 584).

Admission made through agent, during existence and in pursuance of his power, is no less evidence against the principal than if made by the principal in person. 22 App. 433, 434 (5) (96 S. E. 269).

If admission of agent, during existence and in pursuance of his power, accompany agent's act, or is so nearly

connected therewith in time as to be free from all suspicion of device or afterthought, it is admissible as part of *res gestae*. 22 App. 433, 434 (5) (96 S. E. 269).

Scope of agency: Declaration of agent is not competent evidence against his principal where it does not appear that such declaration was made while engaged in the business of the master or principal. 21 App. 246, 247 (3) (94 S. E. 322).

Warehousemen: Agreements of agent in charge of warehouse, when within scope of his authority, are binding on warehouse company, under sections, 3593, 3595, 3598, 3606. 144/598, 599 (4) (87 S. E. 804).

ARTICLE 3.

Rights and Liabilities of Agent as to Third Persons.

§ 3608. (§ 3036.) Money paid by mistake may be recovered.

Ignorance: Where agent of the seller of land transferred money paid by the purchaser to his principal before notice of alleged mistake as to parcel of land that was to be conveyed, such

agent is not personally liable to the purchaser in an action for money had and received, it appearing that such agent acted in good faith. 18 App. 765 (2) (90 S. E. 654).

§ 3609. (§ 3037.) When he has a right of action.

General Note.

Pleading: Where contract for sale of certain property was executed by certain person as attorney in fact for the owner, petition in suit for breach of contract by such person, as attorney in

fact for the owner, which did not disclose any fact that would give such person right to bring the action was subject to demurrer. 22 App. 175 (95 S. E. 739).

§ 3611. (§ 3039.) When responsible for credit given.

Evidence: Court did not err in admitting testimony of officer of plaintiff advertising agency that credit for account sued on was given to defendant and not to milling company of which defendant was vice-president. 24 App. 182 (1) (100 S. E. 235).

Unincorporated: Attempted sale of personal property to "corporation" not yet in existence, made to individual who claims to be agent but who gives

his individual notes for purchase price, and who signs individual name to retention-of-title contract, is in law sale to individual, and vendor, by suit in trover, can recover property or value from innocent third person who had possession and who purchased at sheriff's sale, goods having been sold as property of corporation not in existence. 19 App. 706 (2) (91 S. E. 1062).

§ 3613. (§ 3041.) Liability for excess of authority.

Bond: Where agent executes, without authority from principal, bond in name of principal as surety, and fails to dis-

close lack of authority, and other parties have no knowledge of such lack, and no ratification by principal ap-

Rights and liabilities of agent as to third persons.

pears, and principal is without knowledge of agent's failure to comply with specific requirements of written power of attorney, and, on account of implied representation as to authority to bind principal, beneficiary in instrument suffers injury, injured person may recover damages from agent individually. 18 App. 369 (89 S. E. 461).

Misfeasance and negligence: One undertaking to operate as conductor a train of passenger cars for railway company owes duty not only to his principal, but also to passengers on train and to general public; and if, while conducting such train, he fails to perform duty thus arising, and in consequence

another person is injured, his failure to perform the duty will amount to misfeasance, for which he will be individually liable. 18 App. 544 (1) (90 S. E. 94).

Scope of employment: Where petition distinctly alleged that wrongful acts of agent of partnership were committed by him while acting as such agent and within scope of his employment, no cause of action against him as an individual, either jointly or severally, was shown and his general demurrer to petition should have been sustained. 18 App. 514 (2-a) (89 S. E. 1103).

Of property and the tenure by which it is held; of realty.

FIFTH TITLE.

Of Property and the Tenure by Which It Is Held.

CHAPTER 1.

Of Realty.

§ 3617. (§ 3045.) Realty defined.

Cemetery lot: Grantee in deed to cemetery lot acquires only easement for purpose of grant. 142/729 (1) (83 S. E. 658).

Easements: Sheriff's entry of levy of execution, describing property as switchboards and all wires, lines, etc., is void for uncertainty of description, in so far as it relates to easements or interests in lands. 262 Fed. 527, 528 (5).

Growing crops: Crop of corn not detached from soil, whether mature or immature, is part of realty, and passes by sale of land without contractual reservation of crop. 148/761 (98 S. E. 347).

Mines: Conveyance of absolute or fee simple estate in land carries with it all mines, minerals, and clays in and under the same; absolute estate in land carries with it the exclusive and unrestricted right to occupy, use, and dispose of the same. 149/777, 782 (102 S. E. 156).

Timber: Under a deed to certain land providing that "pine timber for saw-

mill purposes 14 inches 2 feet above the ground and up, and the turpentine privileges also excepted from this sale," title to such timber did not pass. 141/47 (3) (80 S. E. 322).

Where deed conveying described tract of land contained, at conclusion of descriptive clause, the provision, "This deed does not convey any timber rights held by the said" grantor, title to none of the timber passed to the grantee, but remained in grantor. 146/750 (1) (92 S. E. 281).

Timber when felled, cut, and stacked in cord-wood becomes personalty, and does not pass as part of realty upon sale of land upon which it lies; title to cord-wood remained in vendor of land and he could recover such wood from purchaser of land in action of trover. 23 App. 358 (1) (98 S. E. 237).

Trade fixtures: Glass show-window which is permanent part of store building is not a mere trade fixture, but is a part of the realty. 18 App. 476 (1) (89 S. E. 590).

§ 3621. (§ 3049.) Fixtures.

Cotton gin: Conveyance of land in fee ordinarily passes title to gin machinery attached thereto, but an agreement to the contrary will be given effect. 141/429 (2) (81 S. E. 225).

Executory contract reserving in vendor right to remove gin machinery from land conveyed within stated time

was not merged in the deed. *Id.* 429 (2-a).

Removal: Vendor's failure to remove machinery from the premises sold within the time stipulated by contract did not forfeit his title to the machinery. 141/429 (3) (81 S. E. 225).

§ 3622. (§ 3050.) Detached becomes personalty.

Dwelling house: Trover will lie to recover dwelling house which was de-

tached from land under circumstances stated, although subsequently, but be-

Of realty.

fore bringing suit, it was attached to land of wrong-doer. 149/61 (2) (99 S. E. 27); 23 App. 724 (1) (99 S. E. 318).
Timber: Parol contract between owner of growing timber and another whereby latter was to immediately cut timber making merchantable cross-ties,

owner to receive stated amount for each tie, and contract to be completed as soon as practicable, was one for sale of growing trees standing upon land, which should be in writing. 148/633 (1) (97 S. E. 671).

§ 3629. (§ 3057.) **Owner of running water.**

Diversion: Right which riparian owner of land adjacent to non-navigable stream has to reasonable use and consumption of water does not include the right to use, divert, or diminish supply so as to materially and unreasonably to interfere with rights and uses of lower owner. 24 App. 93 (1) (100 S. E. 21).

Where evidence was uncontradicted that, prior to construction of railroad, land on which it was constructed adjacent to plaintiff's fish pond was conveyed to railroad company by plaintiff, deed stipulating that land should be used only for purpose of common carrier, and that grantor reserved privilege of raising water in his fish pond, and where there was no charge of negligence, nor any evidence that railroad was improperly constructed or maintained, etc., verdict for defendant in action for damage to fish pond caused by diversion of rain water, was proper. 24 App. 530 (1) (101 S. E. 715).

Jury: Whether use of water by upper owner in non-navigable stream is unreasonable is question for jury on facts of particular case, including size and character of stream and uses to which it is subservient. 24 App. 93 (1) (100 S. E. 21).

Mill privileges: Deed here conveying land to middle of original stream entitled grantee to reasonable use of the water in the millpond adjacent to the land, and upon which was located grantee's power plant, provided such use did not materially interfere with the mill privileges conferred in partition with a lower riparian owner, where such owner and such grantee claimed title from a common source. 141/202 (a) (80 S. E. 785).

The grantee of a mill privilege, without special mention of water, takes a right to the actual flow of the stream, subject to its reasonable use by upper riparian owners. *Id.* 202, 206.

§ 3630. (§ 3058.) **Streams boundary lines.**

Middle: Where a plat, referred to in a grant of State land as furnishing a description of the land conveyed, called for a non-navigable river as a boundary, the grant extended to the middle thread of the stream. 141/153 (2-a) (80 S. E. 657).

Mill privileges: Decree in partition di-

viding mill property so as to allot a certain tract to an heir, together with "appurtenant mill privileges up and down the creek as far as the lands extend," conveys the land and the right to pond the water and to use so much thereof as is necessary to operate the mill. 141/202 (b) (80 S. E. 785).

§ 3632. (§ 3060.) **Owner of adjacent lands.**

Fishing rights: Owner of land adjoining non-navigable stream is owner of soil to center of the thread of the stream, and of the fishing rights to center of thread on his side of stream; if one proprietor owns land on both sides of stream, he has exclusive right of fishing therein. 148/701 (1) (98 S. E. 353).

Right of fishing is not severed from ownership of fee by grant which does not by its terms either expressly convey the right, or necessarily include it, as, for instance, unrestricted grant of all water rights or privileges. 148/701 (1-a) (98 S. E. 353).

Grant by owner of fee of "mill privileges" carries right to reasonable

Of realty.

use of land and water necessary to operation of mill, but does not grant

any fishing privileges. 148/701 (1-b) (98 S. E. 353).

§ 3634. **Water-powers, development of.**

Nuisance: Right of company to build dam does not entitle it to so build or maintain it as to cause nuisance in-

jurious to health of adjacent community. 143/776 (1) (85 S. E. 945).

§ 3636. **Navigable tide-water defined.**

Public terminus: Navigable tidewater includes any inlet where tide regularly ebbs and flows, used for navigation or capable of bearing at mean

low tide freighted boats in the regular course of trade, although there is not public terminus at both ends of inlet. 144/23 (1) (86 S. E. 244).

§ 3637. **Rights of landowners.**

Low-water mark: Where navigable inlet is privately owned, landowner's property rights to exclusion of pub-

lic extend to low-water mark. 144/23 (2) (86 S. E. 244).

§ 3641. (§ 3065.) **Private ways.**

Closing: Where owner sold part of land, describing it as bounded by a way, the grantee acquired such an interest in the way that owner could not subsequently close it without his consent. 143/104 (84 S. E. 373).

Estoppel: Fact that landowner had conveyed land for railroad right of way did not preclude him from acquiring prescriptive title under this section to private way across land conveyed. 143/516, 517 (2) (85 S. E. 863).

Fee simple: Reservation in deed here in fee simple of right of way for tramroad and railroad purposes reserved in grantor merely an easement and does not constitute an exception from the operation of conveyance described parcel of land owned by grantor; words "fee simple" are descriptive of the extent of duration of the enjoyment of such easement. 145/817 (1) (90 S. E. 44).

Improved land: Where railroad was constructed on right of way granted by landowner, and tracks were made to cross such way by trestle, railroad land at intersection was improved land within this section. 143/516, 517 (2) (85 S. E. 863).

Injunction: Where grantor attempts to close a way in which grantee has acquired an interest, he may be enjoined at instance of grantee. 143/104 (1) (84 S. E. 373).

Obstruction: Where person has used

private way for more than 30 years through another's improved lands, without gates or other obstructions, erection of gates or fences across way entitles prescriber to enforce removal of same. 144/404 (2) (87 S. E. 385).

Prescription: Person, who has uninterruptedly used private way not more than 15 feet wide through another's improved lands for more than seven years, acquires prescriptive title thereto. 144/404 (1) (87 S. E. 385).

Principles underlying prescriptive right of way are not to be confounded with principles regulating establishment of new or necessary way in any of those cases wherein adequate compensation to landowner is provided by law. 21 App. 527, 529 (6-a) (94 S. E. 807).

One complaining of obstruction of alleged prescriptive private way across lands of another must show uninterrupted use of way for more than seven years, that it was not more than fifteen feet wide, that it is the same fifteen feet originally laid out, and that he has kept it open and in repair. 23 App. 689 (1) (99 S. E. 230); 710 (99 S. E. 227).

Width: By seven years' using of private way less than 15 feet wide, and continually keeping it in repair, private way by prescription acquired. 143/516, 517 (2) (85 S. E. 863).

Of personalty.

§ 3644. (§ 3068.) **Forfeiture or abandonment of easement.**

Non-user: Where easement has been acquired by grant, mere non-user without further evidence of intent to abandon

it will not constitute abandonment. 148/317 (2) (96 S. E. 625).

§ 3645. (§ 3069.) **Parol license, when not revocable.**

Telegraph company, which, with consent of railroad company, built its line over railroad right of way and maintained

it 40 or 50 years, acquired perpetual easement. 227 Fed. 276 (1).

CHAPTER 2.

Of Personalty.

§ 3648. (§ 3072.) **Chose in action.**

Cited. 13 App. 636, 639 (79 S. E. 753).

§ 3651. (§ 3075.) **Increase follows mother.**

Stated. 19 App. 192 (1) (91 S. E. 220).

§ 3652. (§ 3076.) **Rights and remedies.**

Homestead: Application to set apart homestead is not a suit. 146/63, 66 (90 S. E. 383).

Right: Generally, admission of liability where none in fact exists, and offer to adjust demand not legally enforceable, could not of itself create legal liability. 23 App. 284 (1) (98 S. E. 92).

Wife can not recover of husband, with whom she is living in lawful wedlock, for tort resulting from his negligent operation of automobile in which they were riding at time of injury. 19 App. 634 (1) (92 S. E. 25).

§ 3653. (§ 3077.) **Assignment of choses in action.**

Cited. 13 App. 663, 665 (79 S. E. 764).

Applied. 142/160, 161 (82 S. E. 556).

Breach of contract: Contract to sell and deliver cotton may be enforced by buyer's assignee. 144/392 (1) (87 S. E. 387).

Carriers: Cause of action for injury to goods awaiting delivery, arising from carrier's negligence as warehouseman, is assignable. 13 App. 636 (79 S. E. 753).

Common law rule that choses in action are not assignable, so as to convey title, but only an equitable interest, changed by this section. 140/435 (79 S. E. 196).

Construction: Where contract is within itself and by its own express terms made assignable, contrary purpose will not, as matter of law, be set up and enforced, unless from consideration of

entire instrument such contrary construction is clearly demanded. 23 App. 290, 291 (5) (98 S. E. 224).

Description: Instrument executed by transferee in bankruptcy, conveying property "consisting of one stock of merchandise, notes and accounts, amounting to about \$2700," was not too indefinite to convey title. 14 App. 520 (1) (81 S. E. 595).

Written assignment here of all moneys, debts, claims, or demands then due or thereafter to become due to assignor by a named company was a valid assignment. 19 App. 184 (1) (91 S. E. 287).

Intermediate assignees: This section permits debtor to set up equities subsisting between original contracting parties, but has no application to equities in favor of debtor against an intermediate assignee. 19 App. 566 (91 S. E. 904).

Of personalty.

Landlord and tenant: Where rent contract, after having been procured and effected at expense and trouble of agent, has been approved for him by the owner, with actual knowledge on owner's part of stipulation therein providing that stated commission from rent shall go from him to the agent, and stating that rent shall be paid to agent named, its successors or assigns, assignee of contract, upon acceptance thereof, will ordinarily assume burdens and acquire benefits provided for by terms of agreement. 23 App. 290, 292 (6) (98 S. E. 224).

Law: Where laborer assigned \$10 as having been earned and due, though only \$8.48 had been earned and no more became due, assignee was entitled to recover \$8.48 in action at law without resort to equity. 17 App. 460 (2) (87 S. E. 754).

Non-negotiable instrument: Where one holds non-negotiable note containing language which would place prudent man upon his guard, maker of such note could, as against holder, make all defenses which would have been open to him against payee. 147/170 (2) (93 S. E. 91).

Though certificate was assignable but, not being negotiable instrument, transferee occupied no better position than contractor, and claim in its hands was subject to all defenses that could have been interposed if suit had been brought by contractor. 19 App. 480 (1-b) (91 S. E. 1050).

Note: Equities between maker and payee of negotiable instrument, originating after transfer to third person, will not affect rights of the holder, though transfer be made after note becomes due. 21 App. 696 (94 S. E. 902).

Writing on back of mortgage-note, "For value received we hereby guarantee the collection and payment of the within note to M. C. Bank and consent to any extension, protest, demand, and notice of non-payment," and signed by payees, was in effect a transfer of the note to the M. C. Bank. 23 App. 710 (1) (99 S. E. 227).

Notice: Contractor's assignment to plaintiff bank of amounts alleged to be due under contract with county was subject to terms of contract, with

notice of which assignee was charged. 144/691, 693 (1) (87 S. E. 1023).

Partial assignment of debt will not vest assignee with title thereto, enforceable in common-law action, without previous acceptance by debtor. 17 App. 459, 460 (2) (87 S. E. 754).

Partnership: Where partnership is dissolved and one partner assigns to another all his right, title and interest in and to assets of partnership, assignee may institute and maintain action against tort-feasor for entire damage sustained by partnership; assignor is not proper party plaintiff, nor is it proper that suit be brought in names of both partners for use of assignee. 149/96 (1-a) (99 S. E. 533); 24 App. 112 (1-a) (100 S. E. 26).

Allegation in petition by one member of partnership that other member sold out to plaintiff all of his right, title and interest in and to assets of the partnership, plaintiff having operated the business since date of said sale under a trade name, and being the sole and exclusive owner of all of the assets of the firm, is sufficient allegation of assignment of chose in action, in absence of appropriate special demurrer, and as against general demurrer that "plaintiff's petition sets forth no cause of action which would authorize a judgment against defendant." 149/96 (2) (99 S. E. 533); 24 App. 112 (3) (100 S. E. 26).

Payment of debt to assignee thereof with knowledge that assignment is void will not discharge debtor from liability to assignor. 15 App. 663 (2) (84 S. E. 147).

Personal confidence: The general proposition that all choses in action arising upon contract and involving property rights may be assigned so as to vest title in assignee does not apply where contract involves relation of personal confidence, such as to show that party conferring rights must necessarily have intended them to be exercised only by him upon whom they were actually conferred. 23 App. 290, 291 (5) (98 S. E. 224).

Where agreement in effect provides that service may be performed either by contracting party or by such other person as contract may be assigned to, in order that construction contrary to

Of personalty.

such express intent can as matter of law be inferred it must appear, from nature of contract, that performance of obligation by another would be essentially different in result from what had been contracted for. 23 App. 290, 291 (5) (98 S. E. 224).

Property: This section and section 3655 distinguish damages to property and damages to person, and under them a right of action for damage to the person can not be assigned, and a right of action for damage to property can be. 13 App. 636, 637 (79 S. E. 753).

In all actions arising *ex delicto* not involving right of property, suit must be brought by party who suffered the injury or tort, and in such a case there can be no use; where, however, right of action does involve right of property, it is assignable, and assignee must bring suit in his own name without joining assignor, which is same rule that obtains in regard to choses in action arising *ex contractu*. 149/96, 101 (99 S. E. 533).

Set-off: Where affidavit of illegality to levy of execution on foreclosure of mortgage pleaded a set-off alleged to be due by plaintiff to her husband, but did not allege any assignment thereof to her, court did not err in sustaining demurrer thereto. 18 App. 414 (2) (89 S. E. 539).

Shares of stock: Where owner of shares of stock agreed to sell same, and the purchaser paid certain money and a note, and seller delivered the certificate, there was a sale, though seller failed to indorse such certificate. 148/97, 98 (2) (95 S. E. 975).

§ 3654. (§ 3078.) Assignment of fund.

Building contract: Where contract with building contractor stipulated that he should be paid specified sum, payable in monthly installments in such sums as architects might in writing certify to be due, and owner reserved right to withhold payment of installment when necessary to protect himself against claims or liens for labor or material, when architects issued certificate that specified sum was due, certificate was assignable, and assignee could enforce it in court of law, as legal assignment of particular fund. 19 App. 480 (1) (91 S. E. 1050).

Specific performance: Assignee of vendee is not subject to obligations of contract of sale, except on his option to enforce it by specific performance. 142/22 (1) (82 S. E. 459).

Surety: Where a note indorsed in blank and discounted at a bank is paid to the bank at maturity by a surety, title passes to the surety by mere delivery without written assignment. 13 App. 785 (80 S. E. 34).

Torts: Chose in action arising from tort is assignable where it involves, directly or indirectly, a right of property. 149/96 (1) (99 S. E. 533); 24 App. 112 (1) (100 S. E. 26).

Wages: Informal written statement of sale of pay check was transfer and assignment of account claimed in compliance with this section, though unaccepted. 17 App. 451 (1) (87 S. E. 754).

Where employee, in good faith and for valuable consideration, sells transfers, and assigns his title and right to possession of stipulated amount of salary due him by his employer, and thereafter collects the money thus transferred, he can not, as against a suit for recovery of the money, avail himself of a discharge in bankruptcy as a defense; the instrument of transfer is an assignment of title. 22 App. 799 (1) (97 S. E. 462); 148/459 (1) (97 S. E. 78; 42 A. B. R. 400, 492).

Writing: To enable holder of note payable to another to set up rights of bona fide purchaser for value, must appear that payee formally indorsed or assigned it in writing to the holder. 13 App. 492 (1) (19 S. E. 359).

Where contract with building contractor stipulated that he should be paid specified sum, payable in monthly installments in such sums as architects might in writing certify to be due, and owner reserved right to withhold payment of installment when necessary to protect himself against claims or liens for labor or material, assignee of such certificate suing to enforce it need not negative existence of liens for labor or materials, this being matter of defense. 19 App. 480 (1) (91 S. E. 1050).

Of personalty.

Check: Unaccepted check, drawn in ordinary form, not describing any particular fund or using words of transfer of the whole or any part of any amount standing to credit of drawer, does not amount to assignment of money to credit of drawer, and non-payment of such check does not give payee right of action against drawee. 23 App. 279 (3) (98 S. E. 122).

Employee: Where employee in good faith and for valuable consideration, sells, transfers, and assigns his title and right to possession of stipulated amount of salary due him by his employer, and thereafter collects money thus transferred, he cannot, as against suit to recover the money, avail himself of discharge in bankruptcy as

defense. 148/459 (1) (97 S. E. 78); 22 App. 799 (1) (97 S. E. 462, 42 A. B. Rep. 400, 492).

Mere delivery to plaintiff by his debtor of certain "time slips," with promise of latter that he would get his pay check from the railroad company and turn it over to plaintiff, did not constitute such a transaction as could have compelled railroad company to pay over fund to plaintiff as assignee, if forbidden to do so by person to whom it was indebted. 22 App. 393, 394 (3) (95 S. E. 1020).

Part of fund: Written order here held not an assignment of legal title to that portion of fund therein specified, but was an equitable assignment thereof. 140/539 (1) (79 S. E. 152).

§ 3655. (§ 3079.) **What not assignable.**

Cited. 141/584, 588 (81 S. E. 863); 15 App. 663, 666 (84 S. E. 147).

Stated and applied. 142/22 (8) (82 S. E. 459).

Carriers: Cause of action for injury to goods awaiting delivery, arising from carrier's negligence as warehouseman, is assignable. 13 App. 636 (79 S. E. 753).

Partnership: Where partnership is dissolved and one partner assigns to another all his right, title and interest in and to assets of partnership, assignee may institute and maintain action against tort-feasor for entire damage sustained by partnership; assignor is not proper party plaintiff, nor is it proper that suit be brought in names of both partners for use of assignee. 149/96 (1-a) (99 S. E. 533); 24 App. 112 (1-a) (100 S. E. 26).

Property: This section and section 3653 distinguish damages to property and

damages to person and under them a right of action for damage to the person can not be assigned, and a right of action for damage to property can be. 13 App. 636, 637 (79 S. E. 753).

Tort: Chose in action arising from tort is assignable where it involves, directly or indirectly, a right of property. 149/96 (1) (99 S. E. 533); 24 App. 112 (1) (100 S. E. 26).

In all actions arising ex delicto not involving right of property, suit must be brought by party who suffered the injury or tort, and in such a case there can be no use; where, however, right of action does involve right of property, it is assignable, and assignee must bring suit in his own name without joining assignor; which is same rule that obtains in regard to choses in action arising ex contractu. 149/96, 101 (99 S. E. 533).

Estates and rights attached thereto; absolute or fee simple estates.

SIXTH TITLE.

Estates and Rights Attached Thereto.

CHAPTER 1.

Of Absolute Estates or in Fee Simple.

§ 3657. (§ 3081.) Fee simple.

Cited. 149/683, 689 (102 S. E. 162).

Alienation: Stipulation in bond for title that bond shall not be transferred, if construed as absolute restriction, is void; conveyance of land by holder of bond did not constitute transfer of bond. 140/435 (5) (79 S. E. 196).

Lost deed: Under this section and section 3929 heir of grantee in unrecorded deed has such interest in land as will authorize him to maintain action to

establish copy of deed after it has been lost. 145/137, 138 (4) (88 S. E. 669).

Mines: Conveyance of absolute or fee simple estate in land carries with it all mines, minerals, and clays in and under the same; absolute estate in land carries with it the exclusive and unrestricted right to occupy, use, and dispose of the same. 149/777, 782 (102 S. E. 156).

§ 3658. (§ 3082.) May be in abeyance.

Life: Will here construed and held that petitioner's right to land was contingent upon incumbrances being removed and named person being in life at expiration of ten years from death

of testatrix; latter contingency not having happened, estate was not vested in such named person, and judge did not err in sustaining demurrer. 149/471 (2) (100 S. E. 566).

§ 3659. (§ 3083.) What words create.

Base fee: Conveyance of land to one in trust for himself and brothers and sisters, with survivorship on death without children surviving, until youngest child reached 21, to be then equally divided between children, gave trustee a fee simple, defeasible upon his death without children surviving. 147/522 (1) (94 S. E. 1007).

Children: Conveyance to grantor's daughter, "trustee for her children," after-born child, who survived grantor's daughter, took fee-simple estate. 140/502 (79 S. E. 133).

Will here construed and held that estate devised to testatrix's daughter, her father having predeceased her, was estate in fee, and that on her death leaving children defeasance therein provided for did not operate, so that her grantee took fee-simple estate in land devised. 144/437 (87 S. E. 469).

Deed executed in 1908, granting certain land to wife of grantor and his "children by her born and to be born, their heirs and assigns," upon expressed consideration of love and affection grantor bore to his wife and his children by her, and \$500.00 paid to grantor, conveyed absolute fee in common to wife and her children by grantor, then in life. 148/672 (1) (97 S. E. 854).

Disposal: Provision in bond for title restricting purchaser's right to alienate lands until last payment of purchase money shall fall due enforceable only for benefit of vendor, and not enforceable after price paid in full. 140/435 (5) (79 S. E. 196).

Where deed operated as conveyance in fee simple to daughter of grantor, effort to restrict sale of property during lifetime of her-

Absolute or fee simple estates.

self and her children was ineffectual. 145/226, 227 (2) (88 S. E. 935).

Direction in will that all of testator's property should be kept together during life or widowhood of his widow, and that she should be supported from income derived therefrom, did not deprive remainderman from selling and conveying his remainder interest. 146/818 (92 S. E. 647).

Under devise to one and his heirs in remainder, his children took no interest in land devised, but vested remainder interest was exclusively in him, and he had right to sell and convey interest before death of life tenant. 146/818 (92 S. E. 647).

Provision in will, "In event that said daughter should die without children, then I invest and clothe her with the right to dispose of said property by deed, will, or otherwise as she may think proper," contemplated contingency that daughter of testator might not leave child at her death, and amounted to a power to said daughter to dispose of estate in remainder "by deed, will, or otherwise as she may think proper." 149/752, 753 (2) (102 S. E. 351).

Life estate: Estate devised in fee will not be reduced unless will expressly so directs, or implication is clear that testator intended to devise only life estate. 144/437 (87 S. E. 469).

Will providing that, "should my said brother" die without children, "then my estate herein given to my said brother shall be equally divided" between next of kin, left fee simple title to brother where brother survived him. 144/526 (87 S. E. 671).

Deed conveying land to certain person and heirs of her body after her death, to have and to hold land to said person, her heirs and assigns in fee simple, conveys life estate to such person, with remainder over to heirs of her body. 14 App. 153 (1) (80 S. E. 664).

Under will devising estate for life to testator's wife and over to a daughter and on her death without children over to a son and his children, such daughter surviving her mother and dying without children took an absolute estate in fee simple. 147/44 (92 S. E. 882).

Where testator devised land to his son, to be delivered to him on his arrival at age, in fee simple, and after his death to his children and issue of such children as might be dead, on death of son without issue or children whole of land reverted to estate of testator. 147/254 (1) (93 S. E. 404).

Under will devising testator's property to wife in trust, for benefit of herself and children, and giving her its entire use and management for life, with power of sale, etc., she took only a life estate to an undivided interest in the property. 147/472 (1) (94 S. E. 563).

Where will of married woman, without children surviving her, bequeathed all of her estate to her husband during his natural life, and recited that her brick house and land attached thereto should be given to her nephew, and that remainder of her land should be willed by her husband as he might desire, and the husband died leaving no children, the husband took a life estate in the entire property, and there was an intestacy as to the remainder interest, except as to the brick house and the attached land, and husband was sole heir and took remainder in fee in whole estate, excluding the excepted portion. 148/472 (97 S. E. 80).

Bequest to daughter, "free from all debts, liabilities, and obligations of any husband she may ever have, and after her death said property to go to her children," imported life estate only for daughter, which was not enlarged into a fee by further provision, "In event that said daughter shall die without children, then I invest and clothe her with the right to dispose of said property by deed, will, or otherwise as she may think proper." 149/752, 753 (1) (102 S. E. 351).

Power: Will here construed and held to empower testator's daughter, on her marriage and being without children, to will to her husband one-half of the property devised to her, but not to vest any interest in the husband in absence of testamentary disposition by the daughter. 142/779, 780 (1) (83 S. E. 788).

Provision of will, "In event that said daughter should die without children, then I invest and clothe her with

Absolute or fee simple estates.

the right to dispose of said property by deed, will, or otherwise as she may think proper," contemplated that donee might execute the power at any time during her life, effect thereof to be postponed until her death, at which time contingency upon which existence of power depended must have happened. 149/752, 753 (3) (102 S. E. 351).

Attempt by donee to execute power before happening of contingency would not render her act invalid, if contingency actually happen. Id.

Where testator devised life estate to his daughter, with power of disposal if she die without children, and during lifetime daughter attempted to convey entire estate in fee for valuable consideration, with warranty of title, inference arose that daughter intended by executing such deed to convey full fee simple title, and her right to do so depended upon her dying without issue. 149/752, 753 (4) (102 S. E. 351).

Timber: Writing, reciting a sale of all merchantable timber on certain land at a certain price, and allowing the purchaser four months in which to remove the timber from one of the tracts, and two years to saw and remove the timber from another tract, was a conveyance of an estate in the specified timber, determinable on failure to sever the same within the dates specified. 141/60 (1) (80 S. E. 7).

Where timber conveyed by a contract was cut and detached from the soil within the time specified, but was not removed from the land, the title thereof was not lost to the gran-

tee merely by such failure to remove. Id. 60 (2).

"Timber" is not a word of invariable meaning, and particular meaning to be given it depends on connection in which it is used; in construing deed conveying timber, it is proper to consider not only terms of conveyance but also purposes of parties to deed. 146/113, 115 (90 S. E. 960).

Trustees: Under conveyance of land to one in trust for sole use of himself and brothers and sisters, and on death of cestui que trust without children share to go to survivors, title on death of trustee vested in his brothers and sisters, and not in his heirs at law. 147/522 (2) (94 S. E. 1007).

Will here construed and held to create estate for life in name daughter of testator, with remainder to such child or children as she may leave at her death, and if she should leave no child or children, then in trust for other daughters of testator and their children. 148/376, 377. (1) (96 S. E. 863).

Construing order of court appointing trustee, in connection with petition here, appointment extended to entire estate, and appointee became trustee for life tenant and remaindermen. 148/376, 377 (2) (96 S. E. 863).

Wife: Will, bequeathing all testator's property to his wife for life, one-half to belong to her in fee simple, to be disposed of by her at her death, gave her an interest for life in an undivided one-half and an absolute estate in fee simple in the other half. 141/424 (1) (81 S. E. 125).

§ 3660. (§ 3084.) Technical words.

Cited. 14 App. 153, 155 (80 S. E. 664).

Children: Under will providing that at expiration of trust all property may be divided in kind or may be sold, and proceeds divided between "my children and grandchildren, two shares to each child and one to each grandchild. If the grandchild is dead, leaving children, such child or children shall inherit the parent's share," none of the distributees took life interest contingent upon their leaving children. 148/747, 748 (2) (98 S. E. 348).

The words "doth grant, bargain, sell, alien, and confirm unto [named person] during her life, and at her death to her children," describe life estate in first taker and remainder to the children, not reduced by the words "her heirs or assigns," which followed. 149/151 (3) (99 S. E. 376).

Class: In devise to one for life, with remainder to his children as a class, there being no child of the life tenant in esse at death of testator, remainder is construed to be contingent until birth of child, when title to remainder im-

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mediately vests, subject to open and take in all children born before termination of life estate. 146/467 (1) (91 S. E. 482).

Heirs, as used in devise to testator's wife for life, then to heirs of his deceased brothers, share and share alike, is equivalent to children, who take per capita and not per stirpes. 145/234 (88 S. E. 963).

Heirs of body: Deed here, construed in the light of this section, held to convey a life estate to one person, so that upon her death her two sons took a vested fee, and her husband had no leviable interest in the land. 141/62 (80 S. E. 286).

Legal heirs: Deed to A. "as trustee for his legal heirs" is conveyance to A. as trustee for his children in esse at

time deed is executed. 145/858 (1) (90 S. E. 65).

Shelley's case: Will giving property to all of testator's children, share and share alike, for the term of their natural lives respectively, with the remainder in fee to their surviving lawful issue, if any, and providing that if any one shall die without issue, his share shall be distributed, share and share alike, among the lawful issue of the others surviving, for and during their natural life, created life estate in each of children of testator, with a contingent remainder over as to such share to the children of each child, and with an executory devise in case any child of testator should die without issue. 140/554 (1) (79 S. E. 546).

§ 3661. (§ 3085.) **Estates tail.**

Children: Will here held to give to testator's daughter life estate with remainder over to her children, and upon her failure to leave children, then to testator's other children or other representatives. 142/41 (2) (82 S. E. 456).

Under trust deed of land, etc., for grantor's children and lawful issue of their bodies, to hold for such children, and on death of any, to his children, each child to receive equal share on reaching age of twenty-one years, and to hold land in fee for children, land was to be divided equally among grantor's children and life estate vested in each child as to portion assigned to him or her, with remainder over, on death of that child, to his surviving child or children. 146/498 (91 S. E. 677).

Devise to certain children, and "should either of my children die after receiving their portion of my estate; and leave no heir, in that case the property received from my estate must be returned to be divided between my other children," conveys fee in share devised to each child, defeasible on death without children, with limitation over to testator's other children. 147/1 (1) (92 S. E. 517).

Under will devising property to children, and on death of any one after receiving his part without heirs over for division between other chil-

dren, share of last child dying without children, in absence of devise of residuum, reverted to testator's heirs. 147/1 (3) (92 S. E. 517).

Deed to man, and at his decease to his child or children or representative of child or children as he may leave in life, creates life estate in first taker, with remainder over to those designated to take at his death. 147/12 (1) (92 S. E. 540).

Under will devising estate for life to testator's wife and over to a daughter and on her death without children over to a son and his children, such daughter surviving her mother and dying without children took an absolute estate in fee simple. 147/44 (92 S. E. 882).

Will here, excluding nephews, and directing that only testator's "children and heirs of their body" should take, testator's children took a fee simple and on death of all children without issue the nephews took as heirs of the last survivor. 147/739 (95 S. E. 288).

Deed conveying to grantor's daughter and her heirs and assigning described land together with all the rights and privileges thereunto belonging, forever in fee simple, consideration being expressed as natural love and affection had for his daughter and her heirs, grandchildren, by said daughter, conveyed the absolute fee to said

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daughter, and her children, though in life at time deed was executed, acquired no estate in the premises, either as tenants in common or as donees in remainder. 148/507, 508 (1-3) (97 S. E. 70).

Class: Bequest to testator's "nephews J. C. G. and J. B. R." was not a bequest to nephews as a class but rather to persons named as individuals. 142/779, 780 (2) (83 S. E. 788). See 145/430 (3) (89 S. E. 418).

Heirs: The word "heir" in devise providing that "should either of my children die after receiving their portion of my estate, and leave no heir, in that case the property received from my estate must be returned to be divided between my other children"; means lineal heir or child; and upon death of child of testator without children, estate devised to such child terminated. 147/1 (2) (92 S. E. 517).

Deed to grantee and her own bodily heirs and assigns would have conveyed fee tail at common law, and under this section conveys fee simple. 145/226 (1) (88 S. E. 935).

§ 3662. (§ 3086.) Remote limitations.

Children: Under trust deed of land, etc., for grantor's children and lawful issue of their bodies, to hold for such children, and on death of any, to his children, each child to receive equal share on reaching age of twenty-one years, and to hold land in fee for children, land was to be divided equally among grantor's children and life estate vested in each child as to portion assigned to him or her, with remainder over, on death of that child, to his surviving child or children. 146/498 (91 S. E. 677).

Devise to certain children, and "should either of my children die after receiving their portion of my estate, and leave no heir, in that case the property received from my estate must be returned to be divided between my other children," conveys fee in share devised to each child, defeasible on death without children, with limitation over to testator's other children. 147/1 (1) (92 S. E. 517).

Will giving and bequeathing to nephew two-thirds interest in certain land, to have and hold the same in fee

Heirs of body: Deed to woman and "heirs of her body after her death" conveys life estate to first taker with remainder over to her children. 144/318 (87 S. E. 22).

Where deed conveyed property to "A. and the heirs of her body by O., their heirs and assigns," and tenendum and warranty clauses provided that property was to be held for use, benefit, and behoof of the said A. and the heirs of her body by O., their heirs, executors, administrators, and assigns, in fee simple, O. warranting the title unto A. and the heirs of her body by O., their heirs, executors, etc., against the said O., his heirs, etc., and against all other persons, A. took fee simple title, although she had children in life at time of execution of deed by O. 147/100 (1) (92 S. E. 887).

Deed to woman, and heirs of her body after her death, conveys life estate to first taker, with remainder over to her children. 147/122 (1) (92 S. E. 875).

simple, and giving the remaining one-third interest to another nephew, and codicil, executed on same day will was executed providing that if such nephews "should die without heirs of their body, then all my property that is willed and given to them go and be the property of [other named persons], to them and their heirs forever, in fee simple," gave the land to such nephews in fee simple, defeasible upon their dying without child or children, although such nephews survived the testatrix. 149/463 (1) (100 S. E. 371).

Heirs: The word "heir" in devise providing that "should either of my children die after receiving their portion of my estate, and leave no heir, in that case the property received from my estate must be returned to be divided between my other children," means lineal heir or child; and upon death of child of testator without children, estate devised to such child terminated. 147/1 (2) (92 S. E. 517).

Under will devising property to children, and on death of any one after receiving his part without heirs

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over for division between other children, share of last child dying without children, in absence of devise of residuum, reverted to testator's heirs. 147/1 (3) (92 S. E. 517).

Issue: Will giving property to all of testator's children, share and share alike, for the term of their natural lives respectively, with the remainder in fee to their surviving lawful issue, if any, and providing that if any one

shall die without issue, his share shall be distributed, share and share alike, among the lawful issue of the others surviving, for and during their natural life, created life estate in each of children of testator, with a contingent remainder over as to such share to the children of each child, and with an executory devise in case any child of testator should die without issue. 140/554 (1) (79 S. E. 546).

CHAPTER 2.

Of Estates for Life.

§ 3663. (§ 3087.) **What is.**

Mortgage: Where interest of mortgagor under will of her deceased husband terminated at her death, there was no error in directing verdict for defendant in suit to foreclose the mortgage. 147/472 (3) (94 S. E. 563).

Trust deed here construed and held to create in grantee life estate only, with legal remainder in such children as trustee left living at time of her death, share and share alike. 147/5, 6 (1) (92 S. E. 514).

§ 3664. (§ 3088.) **How created.**

Children: Deed here construed and held to grant life estates to grantor's children. 144/115 (1) (86 S. E. 235).

Provision in will, "In event that said daughter should die without children, then I invest and clothe her with the right to dispose of said property by deed, will, or otherwise as she may think proper," contemplated contingency that daughter of testator might not leave child at her death, and amounted to a power of said daughter to dispose of estate in remainder "by deed, will, or otherwise as she may think proper." 149/752, 753 (2) (102 S. E. 351).

Deed here created trust for life estate only. 142/317 (1) (82 S. E. 890).

Heirs: Clause in deed, "The intention of this deed is that the said S. shall

hold all of said land during his natural life; then the title to vest in his heirs," did not create life estate in said S. 147/365 (1) (94 S. E. 237).

Restricting sale: Deed reciting that tract conveyed is all grantee will get of lot described, that it is not to be sold, and is to remain grantee's and her children's for her and their natural lives, does not reduce estate to life estate, but seeks to restrict sale during time specified. 145/226, 227 (1-a) (88 S. E. 935).

Will here construed and held to give testator's widow life estate in half of certain land which, at her death, reverted to testator's estate to be equally divided among certain children. 145/775 (83 S. E. 790).

§ 3665. (§ 3089.) **Estates during widowhood, etc.**

Will naming testator's widow as one of those to take an estate which had been devised to her during her life and widowhood, in remainder, she takes an estate for life or widowhood in the land devised and also a share of the fee in remainder. 140/891 (3) (79 S. E. 772).

Will here held to create an estate in

testator's wife for life or during widowhood, subject to certain charges imposed, with remainder to the children. 141/422 (2) (81 S. E. 200).

Under will giving testator's widow his land and personalty, and declaring "This bequest is to my wife for and during her life or widowhood," the wife's estate in the land was for

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life or widowhood, though the word "bequest" technically relates to personal property. 142/41 (1) (82 S. E. 456).

Will here construed and held that widow of testator took estate for life or during widowhood. 142/366 (1) (82 S. E. 1071).

§ 3666. (§ 3090.) Rights and liabilities of tenant for life.

Levy and sale: Deed here created in grantee life estate, which was subject to levy and sale under execution against him. 144/208 (86 S. E. 536).

Remaindermen: Where will devised certain land in trust for a woman for life, with remainder to her children, or to plaintiffs if she should die childless, the burden was on plaintiff in an action to recover the land, to prove that the life tenant died childless. 141/377 (1) (81 S. E. 198).

Remaindermen, whose estate is vested subject to divestiture upon their death before life tenant, can not, during existence of life estate, maintain suit to cancel deed executed by life tenant individually and also as their trustee purporting to convey estate in solido. 145/851 (1) (89 S. E. 1074).

Sale: Absolute power of sale was conferred on testator's wife, where necessary for her support, by will devising testator's estate both real and personal, for her support and control during her lifetime and providing that she should use all of the property as she needed for her comfort and support. 140/601 (1) (79 S. E. 535).

Where evidence showed that widow was unable to support herself, and that she sold some of the estate to obtain money for her support, charge,

in action against the purchaser by testator's representative, that if jury believed it was absolutely necessary for the widow to sell in order to obtain means of livelihood, and that acting under authority of the will she made the deed and received a reasonable and fair consideration, it would be the jury's duty to find for defendant, was not erroneous. Id. 601 (2).

Will creating an estate for life or during widowhood in the testator's wife, with remainder to children, and designating her as executrix, did not confer upon her any power of sale. 141/422 (2) (81 S. E. 200).

Deed from executrix, who was also life tenant, conveyed her interest as against remaindermen, though because of invalidity of the sale it was ineffective to convey the entire estate. Id. 422, 423 (3).

Will here construed and held not to confer on testator's widow power of sale of fee in property devised, though it gave her control and management during her widowhood. 142/366 (2) (82 S. E. 1071).

Where widow executed fee-simple deed both as executrix and in her individual capacity, such deed conveyed her life-estate only. Id.

§ 3671. (§ 3095.) Of lands.

Stated and applied. 142/1 (82 S. E. 292).

Estoppel: Grantee here not estopped from asserting in her action after death

of common grantor to recover land that her title was superior to that of second grantee. 143/31 (1) (84 S. E. 55).

CHAPTER 3.

Of Estates in Remainder and Reversion.

§ 3674. (§ 3098.) Definitions.

Cited and applied. 145/610, 613 (89 S. E. 696).

Children: Where testator devised land to his son, to be delivered to him on his

arrival at age, in fee simple, and after his death to his children and issue of such children as might be dead, on death of son without issue or children

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whole of land reverted to estate of testator. 147/254 (1) (93 S. E. 404).

Where testator devised land to his son, and on his death to his children or issue, such son took no reversionary estate by inheritance, and his grantee took only the life estate, though land reverted to testator's estate. 147/254 (2) (93 S. E. 404).

Deed here created estate in remainder. 142/317 (1) (82 S. E. 890).

Interest: Provision of will here gave testator's wife one-sixth interest in remainder or residue, which included reversionary interest in land devised to her for life in another item of will. 144/743 (87 S. E. 1022).

Legacies: Under will giving certain sum absolutely to wife, and, if estate was insufficient, half of sum for life, with reversion to the estate, and giving the wife house and lot for life, any reverter to the estate to be prorated among other legatees, all legacies to be increased proportionately in case of excess of estate, it devolved upon executors to sell house and lot and distribute proceeds among the various legatees ratably. 148/522, 523 (2) (97 S. E. 524).

Legal remainder: Estate created by will here was legal and not equitable estate, where will created life estate in testatrix's husband and daughter, and provided that on their death property should be sold and proceeds divided in

stated way. 143/728 (2) (85 S. E. 891).

Estates in remainder are purely legal, so that trust created by deed here did not apply to them. 144/115 (1) (86 S. E. 235).

Railroads: Estate created by deed conveying to railroad company land for railroad purposes only and for time that they shall so use it would revert to grantor and his heirs when railroad failed to use premises for such purposes. 142/14 (1) (82 S. E. 233).

Title: Where one without title executes deed purporting to convey land to another for life, with vested remainder to children of life tenant, such children will not, by virtue of the deed, acquire such title as will support action for recovery of the land after death of life tenant. 146/420 (1) (91 S. E. 479).

Use: Where grantor conveys land with provision that it shall revert to him whenever grantee ceases for period of time to use it for specified purposes, and afterwards same grantor conveys land to another grantee unconditionally, and after death of grantor first grantee ceases to use land for period and for purposes stated in first grant, land reverts, not to heirs of deceased grantor, but to second grantee and his successors in title. 147/329 (1) (93 S. E. 877).

§ 3675. (§ 3099.) **No particular estate necessary.**

Trust deed here construed and held to create in grantee life estate only, with legal remainder in such children as

trustee left living at time of her death, share and share alike. 147/5, 6 (1) (92 S. E. 514).

§ 3676. (§ 3100.) **Vested or contingent.**

Children: Where will bequeathed life estate to E., with remainder in equal shares to her husband and her children or representatives of her children, and after testator's death and during the life of the life tenant one child conveyed her interest under the will to S., and died before the life tenant, leaving children who survived life tenant, the devise did not create an absolute vested estate in the children of E., and S. did not acquire a perfect title as against his grantor's children. 141/405 (81 S. E. 205).

Will construed and held that at death or marriage of widow remainder was to be divided equally among testator's children then in life and the children, if any, of such as may have died. 142/366 (1) (82 S. E. 1071).

Devise to one for life and at his death to his children, in absence of apparent contrary intent, creates vested remainder in life tenant's children living at testator's death. 143/134 (84 S. E. 552).

Deed to A. "for and during his natural life, and at his death to be equally

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divided between the heirs at law of'' A., creates life estate in A., with the remainder to his children; remainder estate is vested in children in esse at time of execution of deed, subject to be opened to let in after-born children. 145/858 (2) (90 S. E. 65).

Where remainder was contingent until birth of life tenant's child, and then immediately vested, opening to take in all children born during life estate, child belonging to such class has leviable interest in property devised. 146/467 (2) (91 S. E. 482).

Under devise to one and his heirs in remainder, his children took no interest in land devised, but vested remainder interest was exclusively in him, and he had right to sell and convey interest before death of life tenant. 146/818 (92 S. E. 647).

Where deed created life estate in first taker with remainder over to his surviving children, and no person to take in the remainder was in esse when deed was executed and none came into existence before termination of life estate, remainder estate failed. 147/12 (2) (92 S. E. 540).

Will here construed, and held that all three daughters having survived both the maker and the life tenant, each was entitled to her respective share in the land devised by the will, in fee simple; and children of one of them (the other two having died without issue) did not acquire any interest whatever in the land it so devised. 149/106, 107 (1) (99 S. E. 298).

Where will of married woman, without children surviving her, bequeathed all of her estate to her husband during his natural life, and recited that her brick house and land attached thereto should be given to her nephew, and that remainder of her land should be willed by her husband as he might desire, and the husband died leaving no children, the husband took a life estate in the entire property, and there was an intestacy as to the remainder interest, except as to the brick house and the attached land, and husband was sole heir and took remainder in fee in whole estate, excluding the excepted portion. 148/472 (97 S. E. 80).

Contingent remainder: Where grantor conveys land with provision that it shall revert to him whenever grantee ceases for period of time to use it for specified purposes, and afterwards same grantor conveys land to another grantee unconditionally, and after death of grantor first grantee ceases to use land for period and for purposes stated in first grant, land reverts, not to heirs of deceased grantor, but to second grantee and his successors in title. 147/329 (1) (93 S. E. 877).

Death of life tenant: Remainder vested on death of life tenants without children or issue of children. 140/16 (78 S. E. 335).

As between grantee in deed reserving right of possession to grantor for life, and grantor's testatrix here, no interest in rents accruing after grantor's death passed under his will, grantee's estate under the deed being vested. 144/192 (2) (86 S. E. 547).

Under deed conveying land to wife for life and over for life to sister, and after her death to daughter, and, if she was married at sister's death then equally to grantor's children, on death of sister before wife entire estate in remainder vested in grantor's daughter, with right of possession postponed until death of her mother, the first life tenant. 147/49, 50 (1) (92 S. E. 871).

Division: Under will providing that after death of testator's wife property devised to her for life shall be divided between two named persons (to be held and enjoyed for life), and that after death of either his wife and children shall take his share, to be equally divided, in fee simple, division between such two second life tenants would be valid, whether made by them individually or by their assigns. 148/322, 324 (6-a) (96 S. E. 628).

Fair division of property between life tenants under will providing for equal division by them was binding as to son of one life tenant, in whom remainder was vested, notwithstanding he was minor at time of division and was not otherwise party thereto. 148/322, 324 (6-b) (96 S. E. 628).

Levy and sale: Vested remainder in land is subject to levy and sale. 145/610 (89 S. E. 696).

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Under will giving certain sum of money to wife absolutely, or if estate was insufficient half thereof for life, and providing that should any of the property given to the wife return to estate, same should be prorated among other legatees, and giving her house and lot for life, and contemplating sale

of property, and giving other money legacies to W. and others, and appointing W. as executor, W. had only an equitable interest in the house and lot, which could not be levied on at suit of one of his creditors. 148/522, 523 (1) (97 S. E. 524).

§ 3677. (§ 3101.) **Rights of heirs.**

Children: Where will created vested remainder in life tenant's children living at testator's death, and a child dies before life tenant, leaving children, such children take by descent the share of their deceased parent. 143/134 (84 S. E. 552).

Where children of testamentary trustee took vested interest in property devised, which interest consisted of equitable title during his life, becoming fee simple estate upon his decease, heirs of trustee's children would inherit interest of such children who predeceased trustee and died intestate. 146/784 (92 S. E. 531).

Common-law maxim, *seisina facit stipitem*, is not of force in Georgia, and vested estate in remainder passes to heirs of remainderman who predeceased life tenant. 147/138 (2) (93 S. E. 93).

Contingent interests are devisable. 140/16 (78 S. E. 335).

Where deed created life estate in first taker with remainder over to his surviving children, and no person to take in the remainder was in esse when deed was executed and none came into existence before termination of life estate, remainder estate failed. 147/12 (2) (92 S. E. 540).

§ 3678. (§ 3102.) **Perpetuities.**

Children: Conveyance in trust for benefit of wife of certain person for life, and on her death to any subsequent wife, remainder to children of such named person, created perpetuity. 145/875 (90 S. E. 67).

Conveyance of shares of stock in trust for use of grantor's wife and any children which may be born to grantor and wife, for and during her natural life, then, in event of her death, in further trust for any future wife of grantor, and any children that may be born

Where remainder estate failed because of lack of takers, on life tenant's death grantor or his heirs were entitled to right of entry, and executor of grantor was entitled to recover land of widow of deceased life tenant. 147/12 (3) (92 S. E. 540).

Will here construed, and held that upon death of named son of testator, prior to 25th anniversary of birth of daughter of testator, corpus of property and subsequent income therefrom passed to surviving brother and sister, and did not descend as an inheritance to the heirs of the deceased son. 147/114 (92 S. E. 887).

Under will directing that remainder of estate be equally divided per capita among nephews and nieces, daughter of niece to take full per capita share in her mother's stead, share of such daughter, dying before testator, did not lapse, and her heirs took her devise. 147/800 (95 S. E. 681).

Under will giving surviving husband estate for life, remainder over to brother and sisters, their children to take by representation, devise to brother was contingent, and where he predeceased life tenant his children living at life tenant's death took as a class. 147/811 (95 S. E. 688).

to him by present or future wife, during life of such future wife, then in further trust to convey same during grantor's natural life to such persons as trustee may deem best, is void, as creating perpetuity. 148/287, 288 (1) (96 S. E. 564).

Intent: When attempt is made to create a perpetuity the law gives effect to the limitations not too remote, declaring the others void, and thereby vests the fee in the last taker under the gen-

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eral limitation. 148/287, 288 (2) (96 S. E. 564).

Issue: Will providing that executors should keep real property undivided until the youngest one of the issue of testator's sons and daughters should become of age, was valid. 140/554 (3) (79 S. E. 546).

Time estate vests: Where second life estate was void because of being a perpetuity, ultimate remaindermen will

§ 3679. (§ 3103.) **Creation by parol.**

Unborn child: Son of one of the second life tenants, not being in esse at death of testator, remainder construed to be contingent until birth of child in whom title to remainder immediately vests, subject to open and take in all other

§ 3680. (§ 3104.) **Vesting of remainders favored.**

Burden of proof was on party contending that remainder estate which became vested in testator's son by will was subsequently divested by his death before that of the life tenant, to prove such divesting. 141/372 (1-b) (81 S. E. 228).

Children: Under will here son of testator took a vested remainder along with testator's other children, subject to be divested in case of the death of such son before the death of the life tenant, in which event the property would pass to the other children. 141/372 (1-a) (81 S. E. 228).

Under will giving land to son in trust for his wife and her children, and at his death to be property of his children, the children took a vested interest in the property devised during life of trustee, becoming fee simple estate upon his decease. 146/784 (92 S. E. 531).

Under will giving land to son in trust for his wife and her children, and at his death to be property of his children, the gift over did not prevent interest of the children from becoming vested upon death of trustee, but operated to postpone enjoyment of full fee simple title until death of such trustee. 146/784 (92 S. E. 531).

Divesting clause: Deed here granted life estates to grantor's children, remainder to their children in esse or to be born, vested as to children in

be entitled to take a termination of first life estate. 145/875 (90 S. E. 67).

Wife: Where conveyance of shares of stock in trust for grantor's wife for life, and for children of grantor and such wife, and in trust for any future wife for life, was void as creating perpetuity and estate could not be vested beyond first life estate, absolute estate vested in life tenant. 148/287, 288 (2) (96 S. E. 564).

children born before termination of life estate and subject to be divested upon happening of contingent events provided for in will. 148/322, 324 (3) (96 S. E. 628).

esse, subject to be divested, and to become vested as to children to be born, subject to be divested. 144/115 (1) (86 S. E. 235).

Deed here conveyed to grantor's daughter an undivided interest, and gave her children subsequently born vested remainders, subject to be divested by her death without leaving children or representatives of children. Id.

Remainder to wife and children of life tenants of equal shares of residue, with provision that if either life tenant died without wife or children, remainder was to go to wife and children of other, and if both died without wife or children remainder was to go to others, did not create contingent remainder, but merely named contingency on which vested remainder would become divested. 148/322, 324 (4) (96 S. E. 628).

Will here construed and held to create vested remainder subject to be divested upon happening of contingent events stated in will. 148/322, 323 (2) (96 S. E. 628).

Effect of language in will here relating to survivorship, was merely to provide for other legatees to take estate of testator in event of death of his daughters or either of them before time fixed by will for vesting absolutely of estate in remainder. 149/106, 107 (2) (99 S. E. 298).

Of estates in remainder and reversion.

Heirs: Under will directing that remainder of estate be equally divided per capita among nephews and nieces, daughter of niece to take full per capita share in her mother's stead, share of such daughter, dying before testator, did not lapse, and her heirs took her devise. 147/800 (95 S. E. 681).

Surviving children: Will here construed and held to create vested remainder interest, and not mere contingent re-

mainder interest. 144/107 (86 S. E. 220).

Will here construed and held that one of testator's children took defeasible vested remainder, and upon her death her surviving children and one grandchild became substituted devisees and as such took the vested remainder devised to her, and that widow of one child was entitled to share equally with five surviving children of the child taking the defeasible vested remainder. 145/852 (90 S. E. 57).

§ 3681. (§ 3105.) **Assent of the executor.**

Death of life tenant: Where executors have assented to legacy to a life tenant, they cannot, upon his death, take charge of the estate in remainder and sell the property, charging commissions and paying counsel fees out of the proceeds. 141/372 (2-a, b) (81 S. E. 228).

Presumed: Assent to legacy by executors will be presumed where life tenant has been in possession for 39 years. 141/372 (2) (81 S. E. 228).

Sale: Where estate in lands is created by will in named person for life, with remainder to certain other persons, and it is also provided that executor shall sell land and make equal division of property among remaindermen, upon

death of life tenant administrator with will annexed may recover land for purpose of selling it and making division provided for. 148/44 (3) (95 S. E. 682).

Court of ordinary may order sale of devised real estate for purpose of paying debts, provided it be necessary to sell same for such purpose. 149/693, 696 (101 S. E. 807).

Under will directing executrix to pay debts without delay, and to make equal division between devisees, duty of selling for distribution, if lands could not be divided in kind, devolved upon executrix. 149/693, 696 (101 S. E. 807).

§ 3683. (§ 3107.) **Lien on one's own property.**

Pleading: Not error here to overrule demurrers to petition in action for damages for fraud of real estate broker

who negotiated sale to plaintiffs. 145/750 (1) (89 S. E. 1071).

§ 3684. § 3108.) **Estates during widowhood.**

Marriage: Will construed and held that upon marriage of legatee her interest in estate terminated and was not revived by the subsequent death of her husband; and upon death thereafter of son of testatrix, without leaving descendants surviving, certain lodge became sole legatee for purpose of carrying into effect the trust created for

the widows and orphans of its members. 140/297 (2) (78 S. E. 1086).

Probate of will: Fact that limitation on particular devise is void under this section, not ground for refusing probate of will properly executed by person having testamentary capacity. 144/198 (86 S. E. 555).

Of estates for years.

CHAPTER 4.

Of Estates for Years.

§ 3685. (§ 3109.) Definition.

Bought and sold: An estate for years may be bought and sold as any other estate. 140/593 (2) (79 S. E. 465).

Common law: At common law the term "real estate" does not include any-

thing short of a freehold. 146/406, 409 (91 S. E. 471); reversed by 248 U. S. 525 (63 L. Ed. 401, 39 Sup. Ct. 181). See 250 U. S. 519 (63 L. Ed. 1123, 40 Sup. Ct. 1).

§ 3687. (§ 3111.) Rights of tenant.

Levy and sale: An estate for years is subject to levy and sale as any other estate. 21 App. 295 (94 S. E. 276).

Where unexpired term of lease was sold by trustee in bankruptcy and the sale assented to by the landlord, by letting purchaser remain in possession, receiving rent from him, and bringing

suit for rent during unexpired term, purchaser can not say that unexpired term was not subject to levy and sale, and that he is only a tenant at sufferance, and can leave premises whenever he will, and so relieve himself of obligation to pay rent. 21 App. 295 (94 S. E. 276).

§ 3690. (§ 3114.) Lease.

Contract: Whether contract contained in written instrument, or in letters between parties, is a present lease or executory contract to make lease in the future depends upon intention of party, which intention is primarily to be drawn from the writing itself. 145/826 (90 S. E. 59).

Estate for years: A lease proper is an estate for years. 21 App. 295 (94 S. E. 276).

Estoppel: Purchaser of unexpired term of lease sold by trustee in bankruptcy will not be heard, after he has purchased and taken possession of and held the premises under the contract of lease, and thereby enjoyed the fruits of the contract, to contend that he is not bound by its terms; by electing to hold under it he will be held to assent to its terms. 21 App. 295, 296 (94 S. E. 276).

Improvements: Under contract which obligated lessee to surrender premises and remove building or improvements, on being given stated notice, lessee did not acquire title to structure on premises as it existed at time of lease, nor any right to material of which it was then composed. 148/308, 309 (2) (96 S. E. 386).

Lessee: Technically, the word "lessee" denotes the holder of a contract for possession and profits of lands and

tenements for a fixed period, for life, or at will. 149/667 (3) (101 S. E. 795); 24 App. 714 (3) (102 S. E. 136).

The term "lessee" is not to be construed as having the same meaning as bailee. Id.

Purchaser of leasehold interest at judicial sale is bound to perform covenants of lease for payment of rent as an assignee of the term; he can not relieve himself from liability for rent by abandonment of the premises. 21 App. 295, 296 (94 S. E. 276).

Termination: Where lease contract of rails, etc., to be placed on main line of railroad gave lessor the right after ten days' notice in writing to declare a forfeiture, such contract was terminated by such notice, and court committed no error in rendering decree for rentals due under the contract and for value of leased equipment as fixed by terms of contract. 148/385, 386 (2) (96 S. E. 995).

Timber: Instrument here held to transfer all right, title, and interest which assignor had in property described in instrument demising and leasing certain timber, as well as all rights which it had according to its terms, including right to extend time for cutting and removing timber. 141/552 (1) (81 S. E. 882).

Of landlord and tenant.

CHAPTER 5.

Of Landlord and Tenant.

§ 3691. (§ 3115.) Relation of landlord and tenant exists, when.

Cited. 148/153, 155 (96 S. E. 131).

Abandonment: Purchaser of leasehold interest at judicial sale is bound to perform covenants of lease for payment of rent as an assignee of the term; he can not relieve himself from liability for rent by abandonment of the premises. 21 App. 295, 296 (94 S. E. 276).

Action: Where evidence in action for rent after abandonment of premises authorized recovery on case as laid, and no demurrer was interposed, defendant waived objection that action for breach of contract was appropriate remedy. 14 App. 828 (3) (82 S. E. 369).

Money expended by tenant for labor and supplies, stock, implements, etc., under lease, and lost to tenant because of hailstorm which made it impossible to continue farming operations, were not recoverable in action for breach of a second lease. 19 App. 677 (92 S. E. 39).

Assignment: Purchaser at foreclosure of hotel leased by previous owner for term of years may, by expressly assuming obligations imposed by lease contract, subject himself to same liability as if such obligations were incorporated in new contract. 17 App. 93 (2) (86 S. E. 333).

Common law: At common law usufruct was subject to levy and sale. 21 App. 295, 296 (94 S. E. 276).

Contract: Lease contract providing that lessee should pay lessor a certain yearly rent in equal monthly payments for a certain term of years and that the lessor "allows a rebate of \$100.00 per month for the first year under this contract, same to cover such improvements or to be otherwise applied as lessee may desire, and same to be deducted from the monthly rental," is ambiguous with reference to allowing rebate, and intention of parties is question for jury. 140/270, 271 (1-a) (78 S. E. 1006).

Where owner of realty violates written agreement to execute lease, though having ability to fulfill same, he is

chargeable with full damages therefor. 14 App. 158 (1) (80 S. E. 668).

Measure of damages is difference between rent agreed to be paid and actual value of use of premises. Id.

Where, with consent of landlord and at instance of lessee, contract is canceled, and new contract signed by another party is substituted, relation of landlord and tenant was not established between parties to original contract. 15 App. 38, 39 (3) (82 S. E. 664).

Cropper: Relation of landlord and tenant is not established by contract between owner of land and another person that owner is to furnish land, stock, tools, and supplies to make a crop, and other person is to do the labor and receive part of crop; person employed to work for part of crop is a cropper, and title to crop and possession of land remain in owner. 20 App. 704 (1) (93 S. E. 253).

Where plaintiff's testimony was that he furnished land, stock, tools, and supplies for other party to make crop, and other party furnished the labor, and plaintiff was to receive "as rent" half of the cotton and two-thirds of the corn and fodder, and that these were terms on which he "rented" the land to the other party, it was error to grant nonsuit on ground that evidence did not show that relation of landlord and cropper existed between parties. 20 App. 704 (2) (93 S. E. 253).

Damages: Section 4400 did not fix the measure of damages for breach of lease of granite quarries obligating lessor to protect plaintiff against any interference by owners of property. 142/305, 307 (4) (82 S. E. 886).

Employee: Where petitioners, under stipulations of lease to defendant, might make reasonable use of water of spring, they were entitled to enjoin arrest of their employee, or any interference by defendant while taking water from the spring. 146/761 (92 S. E. 523).

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Where farm owner employs another to superintend farm, and, in order to facilitate services to be rendered, provides house on farm in which superintendent shall reside, and in addition to monthly salary agrees that superintendent shall use vegetables and other food products grown and produced on the farm, relation of employer and employee arises, but relation of landlord and tenant does not arise relatively to house or farm. 149/370 (100 S. E. 103).

Estoppel: Purchaser of unexpired term of lease sold by trustee in bankruptcy will not be heard, after he has purchased and taken possession of and held the premises under the contract of lease, and thereby enjoyed the fruits of the contract, to contend that he is not bound by its terms; by electing to hold under it he will be held to assent to its terms. 21 App. 295, 296 (94 S. E. 276).

Evidence: Tenant having agreed to pay landlord specified rental, evidence as to rental value of premises is immaterial and irrelevant. 13 App. 392 (1) (79 S. E. 246).

Levy and sale: A contract of rental with only a usufruct to the tenant is not subject to levy and sale. 21 App. 295 (94 S. E. 276).

Option to buy: Contract here was a lease with option to buy, exercisable at end of lease on lessee's full performance of the lease contract. 143/403 (85 S. E. 127).

Pleading: Petition in action for breach of lease of granite quarries which obligated the lessor to protect plaintiff from interference by owners of property was not demurrable for failure to allege that plaintiff was tortiously evicted. 142/305, 307 (6) (82 S. E. 886).

Petition in action for rent alleging that plaintiff leased certain premises to R. for term of years that R. was adjudicated a bankrupt, and the trustee in bankruptcy sold the unexpired term of the lease to defendant, receiving from trustee a bill of sale, copy of which was attached to the petition, that defendant took possession and occupied the premises under such bill of sale, paying rent up to certain date, and that he has refused to pay rent

after such date though requested to do so, and that he is indebted to petitioner in certain sum, set forth cause of action. 21 App. 295 (94 S. E. 276).

Possession: In lease contract, where there is no stipulation to contrary, lessor impliedly warrants that leased premises shall be open to entry by lease at time fixed for taking possession. 23 App. 181, 182 (3) (98 S. E. 94).

While lease takes effect upon its execution, and right of possession and enjoyment is condition precedent to right of lessor to recover rent, yet, before lessee can repudiate contract on ground that possession was wrongfully withheld, he must do something to show that he desires possession. 23 App. 181, 182 (3) (98 S. E. 94).

Where installment contract for sale of property retains title until payment of purchase money, and it is stipulated that if any installment is not paid vendor may take possession without legal process and all payments shall be applied as rental for said property and depreciation in value, contract is one of conditional sale and not one of lease. 23 App. 304 (2) (98 S. E. 98).

Quiet enjoyment: Covenant for quiet enjoyment is implied, but such covenant goes only to extent of engaging that landlord has good title and can give unincumbered lease for term stipulated, and does not amount to undertaking that premises are suitable for particular use for which intended by lessee, or that lessee will not be disturbed or annoyed in conduct of such business by acts or omission of cotenant in exclusive possession, under landlord, of another portion of same building or of adjacent building, in which cotenant is conducting lawful business. 18 App. 636 (2) (89 S. E. 1099).

Railroad: Where evidence did not show transfer of contract between plaintiff, as lessor, and individual defendant, as lessee, to defendant railroad company, nor any adoption by latter of such contract, it was error to render judgment against such company for rental due under such contract, or for value of rails, etc., as determined by agreed purchase price named in the contract. 148/385, 386 (1-b) (96 S. E. 995).

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Renew: Lease giving lessee privilege of renewing said contract contained option of renewal. 142/193 (1) (82 S. E. 518).

Replacement: Where contract for lease of restaurants with table linen and other articles requires return of property at termination of lease in as good condition as when received, except natural wear and tear incident to constant use, and the replacing of all articles broken or lost, or payment therefor at invoice value less yearly depreciation of 5% per annum, contract will not be construed as requiring lessee to replace or pay for linen completely worn out by natural wear and tear, or linen stolen from lessee which must have been destroyed by such wear before termination of lease if it had been so used. 20 App. 130 (92 S. E. 770).

Services: Value of services rendered by tenant in planting cotton under lease contract was recoverable in action against landlord for damages caused by being compelled to abandon contract by reason of landlord taking possession of cotton planted. 19 App. 677 (92 S. E. 39).

Standard contract for rent implies one in which tenant pays as rent third of corn crop and fourth of cotton crop. 17 App. 496 (2-b) (87 S. E. 764).

Sub-tenant: Crop produced on any part of rented premises is liable for whole rent, though produced by sub-tenant, unless landlord or his transferee assented to or ratified sub-letting. 143/479 (1) (85 S. E. 315); 16 App. 355 (1) (85 S. E. 358).

One tenant may be substituted for another under express contract, or such contract may be created by mutual course of conduct. 16 App. 342 (2) (85 S. E. 349).

Evidence here authorized inference that there was express agreement between original parties to lease that another person should be substituted as tenant. *Id.*

Sub-lease providing that lessor should supply gas, heat, steam power, etc., and providing that if he should be unable to procure coal, after reasonable efforts, failure would not render him liable to the lessee, was sufficiently certain to be basis of suit for damages for breach whereby lessee was deprived

of its enjoyment; damages claimed were not too remote or speculative. 148/624 (1) (97 S. E. 678).

Landlord may elect to treat under-tenant or lessee of his premises as his own tenant, and, upon such affirmative election being made, continued occupancy by undertenant renders him liable to landlord for subsequent rent. 23 App. 562 (1) (99 S. E. 54).

Although there was testimony that in former proceeding by same plaintiff to evict same defendant, and which resulted in mistrial, defendant testified that he had been accepted by owner as tenant in lieu of original tenant, where plaintiff, by her own testimony completely negated right to maintain distress-warrant proceeding, by stating that she never accepted nor recognized defendant as her tenant, she was bound by her admissions thus made, despite testimony as to previous conduct and admissions of opposite party. 23 App. 562 (2) (99 S. E. 54).

Surrender: Where tenant abandons leased premises without consent of landlord who informs tenant that he will relet premises if possible and credit him with whatever is collected, tenant is not relieved from liability for rent. 14 App. 828 (1) (82 S. E. 369).

Where tenant interposes no objection to statement of landlord as to reletting, landlord may make such contract on tenant's account without his knowledge or express consent. *Id.* 828 (3).

To constitute surrender by operation of law, there must be acceptance by landlord. 16 App. 663 (2) (85 S. E. 981).

Mere giving of keys to landlord does not of itself show surrender. *Id.*

Letters written by landlord's agent to tenant did not show acceptance of surrender, where they indicated nothing but willingness to release tenant on conditions not accepted by him. *Id.* 663 (3).

Title: Evidence here in administrator's action to dispossess tenant was insufficient to sustain defense that administrator as landlord had parted with his title during tenancy. 141/609 (81 S. E. 855).

Value: State of preparation and condition of farm when tenant entered may

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be taken into consideration in estimating value of lease. 19 App. 677 (92 S. E. 39).

Where actual value of lease ex-

§ 3693. (§ 3117.) **How created.**

Applied. 19 App. 59 (2) (90 S. E. 1033).

Evidence here in dispossessory warrant proceeding did not authorize finding that new lease contract was made by the parties, but showed only mere promise to contract at future date. 24 App. 183 (100 S. E. 232).

Parol contract: Contract of rental for

ceeds amount of rent to be paid, tenant may have recovery on that account where lease has been breached by landlord. 19 App. 677 (92 S. E. 39).

period not exceeding 12 months may rest in parol. 15 App. 657, 658 (3) (84 S. E. 174).

Purchaser of realty from landlord during term of tenant at will is entitled, upon notice as prescribed by section 3709, to terminate the tenancy and thereafter dispossess tenant. 24 App. 259 (1) (100 S. E. 653).

§ 3694. (§ 3118.) **Landlord not liable for negligence of tenant.**

Definition: The word "owner" as used in section 4420, is not synonymous with "landlord," as used in this section. 21 App. 246 (1) (94 S. E. 252).

Different tenants: In respect to each other cotenants are strangers, and if damage to one tenant be caused not by any act or negligence to repair of the landlord, but by fault exclusively of cotenant, such cotenant, and not the landlord, is liable. 18 App. 636 (3) (89 S. E. 1099).

Defendant in action by landlord for rent cannot recoup damages on account of nuisance created and maintained by cotenant, on premises in exclusive possession of such cotenant. 18 App. 636, 637 (3-a) (89 S. E. 1099).

It was error, in action by landlord for rent in which defendant sought to recoup damages from nuisance caused by cotenant, to exclude testimony tending to show that lessor had no control over premises in which alleged nuisance was created, and had no connection whatever with conduct of business producing nuisance complained of. 18 App. 636, 637 (5) (89 S. E. 1099).

Court erred in charging that under lease between parties, plaintiff impliedly covenanted with defendant to give latter quiet enjoyment of leased premises, as against acts or hindrances of those holding under him, effect of such charge being to authorize recovery against landlord of damages on account of conduct of other tenants holding under landlord and occupying other premises, over which landlord re-

tained no control. 18 App. 636, 637 (6) (89 S. E. 1099).

Knowledge: Landlord is liable for death of child lawfully on premises resulting from landlord's failure to repair defects known to him. 142/715, 716 (2) (83 S. E. 670).

Notice: Landlord is not liable for injuries sustained by tenant's wife because of defective condition of certain steps, unless it be shown that landlord had notice of defective condition of steps, and failed to repair within reasonable time. 19 App. 485 (1) (91 S. E. 875).

Until landlord who has parted with both possession and right of possession is put upon notice that rented premises are out of repair, he is not liable in damages for failure to make necessary repairs. 21 App. 246 (2) (94 S. E. 252).

Pleading: Allegations here as to injury to tenant's child from falling in of rotten plank in floor, and as to previous notice to landlord of defective condition of floor, and his failure to inspect and repair as requested by tenant, set forth good cause of action in favor of child against landlord. 18 App. 250 (89 S. E. 167).

Possession: Where owner of land has fully parted with both possession and right of possession by any lawful contract of rental, his liabilities are those prescribed by this section; in such case section 4420 is without application, but it is otherwise where the possession or the right of possession is not fully

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parted with. 21 App. 246 (1) (94 S. E. 252).

Presence of deceased child on premises held here to be shown by petition to have been lawful. 142/715, 716 (2) (83 S. E. 670).

Repairs: Fact that rented premises consisted of amusement park, and further fact that landlord—a railroad company

—thereafter advertised the amusements at the park for sole purpose of increasing passenger traffic over its line of road leading to the park do not affect application of principles relating to liability of landlord for damages for failure to make necessary repairs. 21 App. 246 (3) (94 S. E. 252).

§ 3695. (§ 3119.) **Rights of tenants.**

Moving picture show, although first class and catering to best class of people, is not within primary meaning of covenant in lease, requiring lessee to operate house as first class theater catering to best class of people. 148/188 (4-a) (96 S. E. 226).

Possession: Allegation in action for damages arising by reason of forcible ejection from livery stable, that plaintiffs were to pay defendant, for rent of stable and a residence, specified sum per month, in absence of allegation as to separate value of stable apart from dwelling house, is subject to special demurrer raising such point, where there is no allegation that plaintiffs'

possession of dwelling house was interrupted or disturbed. 18 App. 196 (1) (89 S. E. 188).

Use: Lessor may by express provision limit general rights of lessee as regards use of demised premises. 148/188 (1) (96 S. E. 226).

Covenant in lease of theater building, which requires lessee operate house at all times as first class theater catering to best class of people, limits general rights of lessee as regards use of premises, and is in effect implied negative covenant against use of building for any purpose other than that named. 148/188 (3) (96 S. E. 226).

§ 3696. (§ 3120.) **Removal of fixtures by tenant.**

Damages: Landlord can recover of tenant such structural damages, if any, as accrued to main building by removal of trade fixture by tenant. 147/639 (1-c) (95 S. E. 228).

Evidence: Where parol testimony of defendant in suit on account for value of certain permanent fixtures, admitted without objection, showed that such fixtures were attached by plaintiff to land which belonged to defendant, and which were removed from land by defendant, verdict for defendant was not without evidence to support it. 19 App. 469 (1) (91 S. E. 787).

Injunction: Petition here praying that defendant be enjoined from removing fixtures from demised premises stated cause of action. 144/295 (1) (87 S. E. 18).

Trade fixtures: Where in order to reach reservoir city laid water-main through lands of others under lease or parol license which was silent as to right of removal of pipe or pipes, laying of

pipes not being for improvement of realty but for use of city in operation of waterworks, pipes are in nature of trade fixtures and removable at any time by city without consent of landowners. 147/344 (4) (94 S. E. 247).

Smokehouse built by lessor for tenant with money furnished by tenant as incidental to tenant's packinghouse business, was a "trade fixture," removable as such. 147/639 (1-a) (95 S. E. 228).

Contracts here between landlord and tenant of premises used in packing house business showed intent that smokehouse erected by landlord with money furnished by tenant was to be treated as a trade fixture, removable by tenant within term. 147/639 (1-b) (95 S. E. 228).

Glass show-window which is permanent part of store building is not a mere trade fixture, but is a part of the realty. 18 App. 476 (1) (89 S. E. 590).

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§ 3697. (§ 3121.) Delivery of possession.

Cited. 140/750, 755 (79 S. E. 842).

Sale here under power by mortgagee in possession as lessee was void under this

section for irregularity and bad faith. 221 Fed. 736 (1).

§ 3698. (§ 3122.) Estoppel.

Stated. 22 App. 197 (95 S. E. 719).

Charge of this section properly refused here. 142/171 (2) (82 S. E. 558).

Conveyance: Where landlord parts with his title pending lease, and thereafter attempts to distrain for subsequently accruing rent, tenant is not estopped from denying relation of landlord and tenant by showing such conveyance, as that does not dispute landlord's title when rent contract was made, but necessarily admits that landlord then had title. 24 App. 509 (1) (101 S. E. 304).

Where landlord parts with title pending lease, tenant thereupon, and by operation of law, in absence of reservation to contrary, becomes tenant of purchaser, and in such case right to recover rent which had not accrued at time of sale is ordinarily not with original landlord, but rests in vendee. 24 App. 509 (1) (101 S. E. 304).

Where distress warrant is instituted by purchaser from landlord pending lease as agent for original landlord, purchaser is estopped from claiming rent on her own behalf, such action conclusively showing that terms of sale did not disturb original relation of landlord and tenant, and that rent remained due and owing, as originally provided. 24 App. 509 (1) (101 S. E. 304).

County jail: Defendant, having recog-

nized right of sheriff to allow him the occupancy of apartments in the county jail, was estopped from denying such right when sheriff sought to evict him at termination of his tenancy and to collect unpaid rent from him. 21 App. 477 (2) (94 S. E. 641).

Notice: Petition in suit for land, alleging that certain parties in possession and turpentine lumber, had been plaintiff's tenants, sale by such parties to member of defendant co-partnership having actual notice of plaintiff's suit against such other parties and that defendants' claim was void, stated cause of action for land and rent. 148/677 (1) (98 S. E. 79).

Vendee of tenant who has apparent legal title and from whom purchase was made, with or without notice of tenancy, cannot dispute title of landlord, in action of complaint for land, until he has restored possession to latter. 148/677 (2) (98 S. E. 79).

Possession: Sale here under power by mortgagee in possession as lessee was void under this section for irregularity and bad faith. 221 Fed. 736 (1).

Where evidence demanded finding that tenant had not surrendered possession of premises, and there was no dispute as to amount involved, judge did not err in directing verdict for plaintiff in distress warrant proceedings. 22 App. 197 (95 S. E. 719).

§ 3699. (§ 3123.) Repairs and improvements.

Abandon possession: Where, after landlord's refusal to repair a house, the tenant remains three or four months, though she has rented by the month, and is made sick by its unsanitary condition, she can not recover from the landlord for her sickness. 141/311 (80 S. E. 1004).

Character of tenancy: Erection of valuable improvements by tenant at will does not of itself operate to change character of tenancy. 142/551 (83 S. E. 137).

Contract: Unless lease stipulates to contrary, landlord must keep premises in repair. 15 App. 816 (1) (84 S. E. 216).

Landlord should, in absence of agreement to contrary, keep premises in repair. 17 App. 93 (4) (86 S. E. 333).

Demand: Tenant need not demand that landlord make necessary repairs, but must give landlord notice of defects and need of repairs before he can

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charge landlord for costs of making same. 17 App. 93 (5) (86 S. E. 333).

Estoppel: Fact that tenant paid rent after sustaining damage by landlord's negligent failure to make necessary repairs after notice did not estop tenant from suing to recover such damage. 14 App. 170, 171 (3) (80 S. E. 679).

Fences: Whether proper fences around premises were necessary for purposes for which premises were rented, and whether such fences needed to be repaired were questions for jury. 18 App. 248, 249 (1-c) (89 S. E. 221).

Landlord was not relieved from duty of keeping fences in repair merely because of provision in lease, "Lessee to have the right to cut sufficient timber for the necessary posts to fence the place." 18 App. 248, 249 (1-d) (89 S. E. 221).

Former owner: Landlord will not be liable for injury to tenant on account of defective construction of rented property which landlord has not constructed or caused to be constructed; liability of landlord for defective construction exists only where building is erected by him in person or under his supervision or direction. 20 App. 203 (3) (92 S. E. 960).

Where building was defectively constructed by predecessor in title, and landlord knew, or in exercise of reasonable diligence could have known, of its improper construction before tenancy was created, he would be answerable to tenant for injury sustained by reason of failure to put premises in safe condition, if tenant could have avoided injury by exercise of ordinary care. 20 App. 203 (3) (92 S. E. 960).

Future day: Landlord is bound to have premises in condition reasonably suited for purposes for which rented, on day lease is to begin. 15 App. 688 (1) (84 S. E. 163).

Improvements: Failure of landlord here to make improvements as provided in lease was breach of his covenant. 145/626 (5) (89 S. E. 769).

In charge referring to defects and repairs, language "to make improvements, build fences," in view of defendant's contention that his agreement with plaintiff's agent included certain improvements for which he was entitled to recoupment, was not er-

roneous. 24 App. 298 (1) (100 S. E. 779).

Inspection: Landlord is ordinarily under no duty to inspect premises while tenant is in possession, in order to keep informed as to their condition, where tenant is entitled to and has exclusive use and possession of the premises. 20 App. 203 (2) (92 S. E. 960).

Latent defects: It is ordinarily duty of landlord to turn over rented property to tenant in condition reasonably safe and suited for purpose intended, and free of such latent defects as exercise of ordinary diligence on part of landlord might have disclosed. 24 App. 94 (2) (100 S. E. 25).

Measure: Where covenant bound landlord to keep premises in repair, and on failure to do so tenant was authorized to make repairs at landlord's expense, on breach of such covenant, where no special damages are claimed by tenant other than effect of breach on value of lease, measure of damages is diminished value of lease due to this breach. 145/626, 627 (7) (89 S. E. 769).

Notice: Charge that if tenant was damaged by leaky roof she could off-set damage against plaintiff's claim for rent was erroneous as omitting element of notice. 144/553 (3) (87 S. E. 771).

Where tenant is in exclusive possession of apartment, landlord's duty to repair arises only on notice, or actual knowledge of necessity for repairs. 15 App. 688 (1) (84 S. E. 163).

That landlord occupied one of apartments in tenement was not of itself sufficient to show that he had actual knowledge that radiators in another apartment were defective. *Id.*

Where there is change in condition of tenement during occupancy, landlord is bound to repair such defects as may be brought to his attention. *Id.*

Where furnace, in proper condition when lease began, became defective during term without lessor's fault, he was entitled to notice and reasonable time to make repairs. *Id.* 688 (2).

Where landlord, after knowledge or notice that premises are out of repair, neglects to repair same within reasonable time, tenant may make repairs

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and recover from landlord therefor. 17 App. 93 (4) (86 S. E. 333).

When rented premises become out of repair, it is duty of tenant to notify landlord of such fact, and also to abstain from using any part of premises use of which would be attended with danger. 18 App. 326 (89 S. E. 437).

Where tenant has notified landlord that premises are out of repair, he has right to use those parts of premises which are apparently in good condition, if there is nothing to call his attention to what may be a hidden defect. 18 App. 326 (89 S. E. 437).

Failure of landlord to repair after notice of defect given by tenant gives tenant right of action for damages sustained by him, and his use of part of premises which was in apparently sound condition will not preclude him from recovering, notwithstanding he had knowledge that there were other parts of premises in defective condition. 18 App. 326 (89 S. E. 437).

Where notice to landlord was not such notice under the law as would call landlord's attention to defects which caused plaintiff's alleged injury in May, court did not err in confining jury to issues raised as to alleged injury of December, occasioned by alleged defective condition of porch. 19 App. 485 (3) (91 S. E. 875).

Ordinarily, before landlord is liable in damages for failure to keep premises in repair, where he has parted with possession, notice of defective condition of premises must be brought home to him. 21 App. 265, 268 (94 S. E. 274).

Where landlord retains qualified possession of and general supervision over rented premises, by placing agent in charge thereof, no notice from tenant is required in order to hold landlord liable for damages for failure to keep premises in repair. 21 App. 265, 268 (94 S. E. 274).

Odors: Fact that leased office, about year after being rented, was rendered untenable by offensive odors from food brought in by rats, did not relieve tenant from obligation to pay rent, where landlord did everything in his power to abate odor. 15 App. 816 (3) (84 S. E. 216).

Patent defects: In absence of agreement landlord is not bound to repair patent defects, existence of which was known to tenant at time rental contract was executed. 13 App. 392 (2) (79 S. E. 246).

Where lessee takes premises with knowledge of patent defects, he can not thereafter demand that landlord remedy such defects. 15 App. 816 (1) (84 S. E. 216).

Where there are patent defects known to both parties at time of executing lease, and lessee takes premises as they are, he cannot thereafter demand that landlord remedy the defect. 18 App. 248 (1-a) (89 S. E. 221).

Whether patent defect, absence of sufficient fencing around premises, was known to both parties when lease was executed was question for jury, and there was evidence authorizing finding in negative. 18 App. 248, 249 (1-b) (89 S. E. 221).

Pleading: Petition here in action by lessee for amounts expended in repairs sufficiently stated cause of action based on adoption of conditions of prior lease between plaintiff and defendant's predecessor in title. 17 App. 93 (3) (86 S. E. 333).

Allegations here as to injury to tenant's child from falling in of rotten plank in floor, and as to previous notice to landlord of defective condition of floor, and his failure to inspect and repair as requested by tenant, set forth good cause of action in favor of child against landlord. 18 App. 250 (89 S. E. 167).

Petition here in action by tenant against landlord for injuries to stock of goods caused by defective automatic sprinklers held to set forth cause of action. 21 App. 265 (1) (94 S. E. 274).

Rebate of rent: Under lease contract providing that lessee should pay lessor yearly rent in equal monthly payments for a certain term of years, and that the lessor allows a certain rebate per month for the first year to cover such improvements or to be otherwise applied as lessee may desire, the lessee had the right to an unconditional reduction of the rental during the first 12 months without reference to any improvements made on the premises

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by the lessee. 140/270 (1) (78 S. E. 1006).

Answer to petition alleging that a reasonable and legal construction of a certain lease contract is to the effect that trade fixtures should be taken into accounting in consideration of a certain rebate of rent is demurrable as being vague and indefinite. *Id.* 270, 271 (2).

Roof: Petition here by tenant against her landlord for damage caused by leakage from portion of building retained by landlord, due to defects of which latter had notice and tenant no notice, was not demurrable. 145/265 (88 S. E. 933).

Testimony here with respect to leaks in roof was not admissible in action against landlord for failure to make repairs, it not being sufficiently restricted to time when leaks existed with relation to date of alleged breach of covenant, nor as included in tenant's notice to landlord, complaining of leaks. 145/626, 627 (8) (89 S. E. 769).

Steps: Tenant injured by defects in front steps of house can not recover from the landlord, though she had noti-

fied him of the defect, where, by exercising ordinary care, she would not have used the steps. 141/224 (80 S. E. 712).

Where, in suit for personal injuries caused by breaking of flight of steps leading to house rented and occupied by plaintiff as tenant of defendant, it appeared that defective timber supporting steps could be discovered only by inspection, that plaintiff had exclusive possession of the premises, and that he had occupied the building for two months prior to the injury, and evidence did not authorize inference that defendant constructed either the building or the steps, and, so far as appeared, defendant did not know of the defective construction, nonsuit was proper. 20 App. 203 (1) (92 S. E. 960).

Wife: Where landlord rented premises to a husband as a family residence, wife could recover in her own right for damage to her separate property in consequence of defective condition of roof, it appearing that landlord had been notified of the defect. 18 App. 533 (89 S. E. 1048).

§ 3700. (§ 3124.) **Distress for rent.**

Stated. 22 App. 743 (1) (97 S. E. 205).

Bankruptcy: Under this section lien of landlord for rent prior to distress is not superior to lien given trustee in bankruptcy by Federal Bankruptcy Act. 231 Fed. 933; s. c. 146 C. C. A. 129; s. c. 36 A. B. Rep. 747.

Charge: Where affidavit to dispossess defendant was founded on single ground that he had failed to pay rent due, and where counter affidavit denied any rent due, or any holding over, charge relating to holding over was not applicable to contentions or the evidence, but, in view of charge, including such excerpt, which clearly submitted real issues, was not erroneous. 24 App. 298 (1) (100 S. E. 779).

Demand for possession is necessary before proceeding to collect single rent due by contract. 140/750 (4-a) (79 S. E. 842).

Double rent: There can be no recovery of double rent except after demand for possession. 140/750 (4) (79 S. E. 842).

Double rent recoverable for time elapsing after end of term is double the value of the property for rent, not double the contract price applicable to the term. *Id.* 750 (5-a).

Where only evidence as to value of place for rent was that it was worth a stated number of pounds of cotton per annum, verdict finding a stated sum of money as rent, not supported by evidence. *Id.* 750, 751 (6).

Where plaintiff testified to making demand for possession, but did not specify date thereof, and defendant denied such demand, error to direct verdict for plaintiff, with double rent for year in which trial took place and preceding years. 140/775 (79 S. E. 945).

Option to buy: Provision, giving lessee option to purchase, did not affect landlord's right to distress warrant on default in rent. 143/403 (85 S. E. 127).

Remove: Granting of nonsuit in distraint proceedings on ground that defendant was removing his goods was

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not error here. 142/447 (1) (83 S. E. 137).

Exclusion of testimony that defendant's clerk offered to sell the entire stock of goods was not error where no authority to make such offer was shown. Id. 447, 448 (2).

In distress for rent due October 15, 1917, evidence that tenant had gathered some wheat off of farm in latter part

of May, and had it ground and used, or exchanged it for family use, would not support plaintiff's contention, in amendment to affidavit to procure warrant, that tenant was seeking to remove crop without plaintiff's consent, and was not substantial enough to authorize distress warrant. 24 App. 304 (100 S. E. 723).

§ 3701. (§ 3125.) Lien.

Mortgages: Landlord's general lien for rent is inferior to lien of mortgages executed before levying of distress war-

rant. 236 Fed. 723 (2); s. c. 38 A. B. Rep. 93; s. c. 150 C. C. A. 55.

§ 3704. (§ 3128.) Interest.

City court of Statesboro at its monthly terms could not try issue raised by counter-affidavit to distress warrant,

where amount claimed exceeded \$100. 17 App. 562 (1) (87 S. E. 848).

§ 3705. (§ 3129.) Title to cropper's crop in landlord.

Cited. 18 App. 57, 58 (88 S. E. 799).

Balance: When relation of landlord and cropper exists, landlord has title to and control of crops until all advances are paid, but when sufficiency of crop has been turned over to pay all advances and leave balance of cropper's portion in hands of landlord, cropper is entitled to demand balance due him from landlord. 19 App. 79 (2) (90 S. E. 1038).

Cotton: Where contract entitled one party, in consideration of his cultivating another's land, to receive one-half of the lint-cotton, he was not entitled to one-half of the cottonseed. 142/50 (82 S. E. 442).

Evidence: Where, in action against a landlord and her cropper for injuries caused by fire "put out" by the latter, there was sufficient evidence to authorize jury to find for plaintiff, though not requiring such a verdict, it was error to grant nonsuit as to defendant cropper. 23 App. 284, 285 (2) (98 S. E. 92).

Fire: Notwithstanding allegations in action for damages caused by burning of house in consequence of burning of trash on farm by one of defendants that in preparing land for cultivation it became necessary to burn off certain trash, and that said defendant in carrying out his farming operations "put out" fire at different points on lands of his employer, co-defendant, and that

these acts were within scope of business, no cause of action was set forth against the landlord as it did not appear that fire was set out under her express direction. 23 App. 284 (1) (98 S. E. 92).

Insolvency: It was not necessary for cropper to allege in his petition that landlord was insolvent. 19 App. 79 (3) (90 S. E. 1038).

Intent: Where landowner took from cropper a rent note containing contract of tenancy, owner suing tenant to administer crop through receivership cannot escape effect of written contract by testifying that execution of contract was not intended to change former contractual relation, but was only to furnish collateral on which to obtain credit by assignment of lien as landlord. 146/824 (92 S. E. 633).

Joint property: In prosecution for larceny of seed cotton alleged to be long jointly to two certain persons, proof that one was landlord and other his cropper, and that each was entitled to undivided one-half interest in cotton, sufficiently sustained allegation of joint ownership. 16 App. 328 (1) (85 S. E. 258).

Laborer's lien: Where landlord makes contract with cropper, under which landlord is to furnish land and fertilizer, and cropper is to do all the work in connection with planting, making,

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and gathering the crop, the cropper is not entitled to enforce laborer's lien before completion of contract, unless for some sufficient legal reason he is prevented from carrying out the contract. 19 App. 655 (91 S. E. 1052).

Partners: That cropper furnishes labor necessary to making of crop, and is to receive portion thereof as compensation for services, does not place him in situation of partner having undivided interest in product of labor. 17 App. 761 (2) (88 S. E. 695).

Pleading: Petition in suit by cropper against his landlord for value of half of crops raised alleging that plaintiff was to leave on said place and did leave on said place the same amount of seed-cane that was planted by him, and that he dug up and banked the same amount of seed-cane that he planted, was not subject to general demurrer on ground that petition set out no cause of action. 23 App. 577 (1) (99 S. E. 58).

Averments in petition in suit by cropper against landlord for value of half of the crops raised that plaintiff was to leave on said place and did leave on said place the same amount of seed-cane that was planted by him and that he dug up and banked the same amount of seed-cane that he planted, were not averments necessary as condition precedent to bringing of suit; and since plaintiff did not claim any indebtedness by reason of such averments, defendant could not require elaboration of petition in such respect. 23 App. 577 (2) (99 S. E. 58).

Ratification: Allegations in petition for damages on account of burning of house on plaintiff's land in consequence of burning of trash on farm by a cropper that defendant landlord failed to discharge said cropper, and admitted liability for injury caused by him, and offered to pay damages, did not show ratification of unauthorized acts of cropper. 23 App. 284 (1) (98 S. E. 92).

Relation of landlord and tenant is not established by contract between owner

of land and another person that owner is to furnish land, stock, tools, and supplies to make a crop, and other person is to do the labor and receive part of crop; person employed to work for part of crop is a cropper, and title to crop and possession of land remain in owner. 20 App. 704 (1) (93 S. E. 253).

Remedies: Where relation of landlord and cropper exists, and landlord wrongfully refuses to perform contract, cropper has three courses of procedure open; (1) If landlord's breach consists solely of refusal to furnish articles which may be obtained elsewhere, cropper may obtain them, complete contract as contemplated, and hold landlord and landlord's share of crop responsible for actual damages resulting; or (2) cropper may sue immediately for his special injuries, if any, including value of services rendered; or (3) he may wait until expiration of harvest season and sue for full value of his share of crop or what his share would reasonably have been under faithful performance of contract by both parties. 22 App. 284 (1) (96 S. E. 16).

Title: Where landlord advances supplies to aid in making crop he has title to entire crop until repaid. 14 App. 311 (1) (80 S. E. 693).

In absence of proof of sale, guano furnished by landlord to tenant under standard rental contract, to be used in cultivating crop to be planted on leased premises, is not subject to outstanding judgments against tenant, where judgment creditor did not extend credit on faith of tenant's possession of such guano. 17 App. 496 (2-a) (87 S. E. 764).

Title remains in landlord until actual settlement. 17 App. 761 (1) (88 S. E. 695).

Evidence here did not show that landlord surrendered legal control over land to cropper, though landlord did not oversee farm, but permitted cropper to use judgment as to crops planted and method of cultivation. Id. 761 (2-a).

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§ 3706. (§ 3130.) Landlord may recover crops disposed of without his consent.

Possessory warrant: Where cropper had sold bale of cotton, to which landlord's right of possession was unquestioned, error, if any, in refusing to dismiss possessory warrant on ground that it was brought for undivided half interest in personalty, was harmless. 17 App. 519 (1) (87 S. E. 763).

Where relation of landlord and crop-

per exists, and before landlord has received his part of crops and is fully paid for advances to cropper in aid of making crops, possessory warrant will lie, under this section, for recovery of such crops as it is shown the cropper seeks to exclude from possession of landlord. 21 App. 169 (1) (94 S. E. 59).

§ 3707. (§ 3131.) Cropper.

See notes to § 3705.

Cited. 144/135, 137 (86 S. E. 324); 13

App. 728, 731 (79 S. E. 906); 16

App. 328, 329 (85 S. E. 258); 18 App. 57, 58 (88 S. E. 799).

§ 3708. (§ 3132.) Duration of tenancy.

Stated. 15 App. 657, 658 (3) (84 S. E. 174).

Calendar year: Where written lease covered full calendar year and provided for payment of rent in advance each month, and testimony showed several definite refusals by landlord to reduce rent, and tenants agreed that landlord might prepare lease on same terms for their acceptance or rejection, and their continued occupation of premises after beginning of new term, with payment of rent each month for six months, in accordance with proposed terms, and notwithstanding further refusal to reduce rent, law will imply agreement on part of tenants to hold for calendar year for same rental, payment monthly, and court did not err

in directing verdict against defendants. 22 App. 217, 218 (1) (95 S. E. 733).

Tenant at sufferance: Tenant for a year continuing in possession after expiration of term, without any right so to do, is a tenant at sufferance. 140/750 (5) (79 S. E. 842).

Where tenants with option of renewal failed to exercise it after expiration of lease and refused to surrender possession, they were tenants at sufferance. 142/193 (1) (82 S. E. 518).

Year: Where one tenders keys to his landlord and they are rejected, but he nevertheless continues to use part of premises for storage, he is to be treated as taking the premises and becoming liable for rent for term of one year. 18 App. 265 (89 S. E. 303).

§ 3709. (§ 3133.) Notice to quit.

Purchaser of realty from landlord during term of tenant at will is entitled, upon notice prescribed, to terminate

tenancy, and thereafter to dispossess tenant. 24 App. 259 (1) (100 S. E. 653).

§ 3711. (§ 3135.) Casualties no abatement of rent.

Adjacent property holders: Proposed amendment, which set up as defense to recovery of rent claim, that tenant was unable to use and occupy premises, because of objections interposed by persons living in neighborhood and adjacent to rented premises, constituted no valid plea, there being in the rent contract no covenant that premises were suitable or fitted for particular use for which intended by tenant, or

that tenant would not be disturbed in his use by acts of other persons, not under control of landlord. 19 App. 18 (1) (90 S. E. 742).

Representations by plaintiff that defendant could occupy peaceably the rented premises without objection on part of third persons living in that locality could not have amounted to more than expression of personal conviction, and could not have amounted

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to guarantee that adjacent property holders might not thereafter object to occupancy of premises by defendant. 19 App. 18 (1-a) (90 S. E. 742).

Odors: Fact that leased office, about year after being rented, was rendered untenable by offensive odors from food brought in by rats, did not relieve tenant from obligation to pay rent, where landlord did everything in his power

to abate odor. 15 App. 816 (3) (84 S. E. 216).

Repairs: Fact that tenant paid rent after sustaining damage by landlord's negligent failure to make necessary repairs after notice did not estop tenant from subsequently setting it off against landlord's claim for rent. 14 App 170, 171 (3) (80 S. E. 679).

§ 3712. Interfering with certain relations.

Constitutional provision: Court of Appeals will not consider question of constitutionality of this section, it not

having been raised in lower court. 13 App. 369 (2) (79 S. E. 179).

§ 3713. Penalty.

Constitutional provision: Court of Appeals will not consider question of constitutionality of this section, it not

having been raised in lower court. 13 App. 369 (2) (79 S. E. 179).

CHAPTER 6.

Of Estates on Condition.

§ 3716. (§ 3136.) Definition.

Construction: While estate may be granted upon condition either express or implied, upon performance or breach of which estate shall either commence, be enlarged, or defeated, law inclines to construe conditions to be subsequent rather than precedent, and to be remediable by damages rather than by forfeiture. 149/587 (1) (101 S. E. 583).

Limitation: Where owner of land sold portion of it, deed reserving right to use thirty feet on one side for purpose of hauling logs and loading logs and lumber so long as he owned remainder of land and operated saw mill on it, and stipulating "that this right of use shall not interfere with business of grantee or his heirs or assigns in or to property conveyed," such restriction against interference with business was but limitation on reasonable use by grantor in enjoyment of easement, and

did not permit destruction of easement by building of warehouse, although such house might be useful in conduct of business. 146/694 (2) (92 S. E. 220).

Sale: Where deed was executed and delivered, purporting to convey fee simple title to land, which, in granting clause provided that by accepting such deed the grantee agreed that he would not sell to any person whatever without first offering it to grantor at and for sum he paid for it, and that if grantor refused to buy, grantee might sell to whomsoever he pleased, but that grantor's refusal must be in writing, such words in the deed were words of covenant upon part of grantee not to sell to another without written consent of grantor, and did not create conditional estate dependent upon condition subsequent. 149/587 (2) (101 S. E. 583).

§ 3717. (§ 3137.) Precedent and subsequent.

Construction: While estate may be granted upon condition either express or implied, upon performance or breach of which estate shall either commence,

be enlarged, or defeated, law inclines to construe conditions to be subsequent rather than precedent, and to be remediable by damages rather than by

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forfeiture. 149/587 (1) (101 S. E. 583).

Forfeiture: Acceptance of purchase money precluded vendor from claiming forfeiture under provision of contract authorizing forfeiture on non-payment of any installment. 140/435 (5) (79 S. E. 196).

Where land is conveyed to be used for certain purpose, with clause of forfeiture if it ceased to be used for object specified, whole estate does not cease if land be permitted to be put to minor use, provided that in main it is used for purpose for which it was conveyed. 146/812 (92 S. E. 642).

Railroad: Deed conveying land "for railroad purposes only and for the time that they shall so use it" does not terminate grantee's estate, though some part of it may be put to use which, though designed to increase railroad business, may not be accessorial to strict railroad use. 142/14 (2) (82 S. E. 233).

To effect forfeiture of whole of estate while used for railroad purposes, where substantial part of land is so used and part is used for another purpose, there must be total destruction of whole estate of grantee. *Id.*

Where, in action to recover land conveyed "for railroad purposes only and for the time that they shall so use it," evidence showed that substantial part of land was continuously used for railroad purposes, and showed no intent to permanently abandon any portion of it, court properly awarded verdict for defendant. *Id.* 14, 15 (3).

Sale: Where deed was executed and delivered, purporting to convey fee simple title to land, which, in granting clause provided that by accepting such deed the grantee agreed that he would not sell to any person whatever without first offering it to grantor at and for sum he paid for it, and that if grantor refused to buy, grantee might sell to whomsoever he pleased, but that grantor's refusal must be in writing, such words in the deed were words of covenant upon part of grantee not to sell to another without written consent of grantor, and did not create conditional estate dependent upon condi-

tion subsequent. 149/587 (2) (101 S. E. 583).

Support: Where verdict and decree in equity cause establish contract for maintenance of defendant, consideration for deed, and that such maintenance was to be furnished at plaintiff's home, and that plaintiff had not, to date of verdict and decree, breached the contract, but that defendant had voluntarily and without legal reason removed from the home of plaintiff, if defendant refused, without legal justification, to return to such home and to accept support subsequently to date of verdict and decree, plaintiff (defendant in justice's court suit) has legal defense to that suit, and her remedy at law is adequate. 148/68 (95 S. E. 683).

Where plaintiff, in action for money had and received, testified that money was given to defendant for specific purpose of aiding in purchase of home to be occupied jointly by them, and defendant testified that plaintiff gave money to her under agreement that she would take care of and provide for plaintiff during remainder of plaintiff's life, verdict in favor of defendant was authorized. 22 App. 354 (1) (96 S. E. 10).

Charge that if money in question was delivered to defendant with intention on part of plaintiff that title to it should pass to defendant, either as gift or as consideration for contract that defendant should take care of her during the remainder of her life, plaintiff could not recover in action for money had and received, but her remedy would be a suit for damages for breach of contract, was not erroneous. 22 App. 354 (5) (96 S. E. 10).

Title: Under deed providing that title should revert to grantor after three years if he complied with certain conditions, title could not revert in the grantor except upon conditions specified. 141/448 (1) (81 S. E. 118).

Deed providing that title should revert to grantor after three years on certain conditions, otherwise title to vest in his wife, did not create a provision for a forfeiture of the husband's title upon the happening of a condition subsequent, but denuded him of

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title, which was not to revert to him except upon condition. Id. 448 (1-a).

Under a deed conditioned that title should revert if during three years grantor should not be guilty of misconduct, it was essential to a reverter that he perform such condition. Id. 448, 449 (1-d).

Under deed from husband to trustee

§ 3718. (§ 3138.) **Repugnant condition.**

Stated. 140/554, 566 (79 S. E. 546).

Alienation: Stipulation in bond for title that bond shall not be transferred. if construed as absolute restriction, is

for his wife, condition that title should revert after three years if grantor had not been guilty of misconduct, otherwise title to vest in the wife, in order for the husband's misconduct to vest title in the wife, it must have occurred during the three years. Id. 448, 450 (3).

void; conveyance of land by holder of bond did not constitute transfer of bond. 140/435 (5) (79 S. E. 196).

§ 3720. (§ 3140.) **Dependent and independent covenants.**

Intent: Promises mutual to extent that each affords sole consideration to other will not be construed as independent, but will, in absence of clear indications to contrary, be taken as dependent one upon the other; while, ordinarily, dependent covenants are such as mutually afford to the other the whole consideration, still stipulations and circumstances of contract may be such as to render covenants mutual and de-

pendent even though one of them affords to the other only a part of its consideration; in such case question whether covenants are mutually dependent is to be determined by reference to rational intent of parties as disclosed by instrument, read in light of surrounding circumstances and purposes for which contract was made. 22 App. 280 (1) (95 S. E. 1028).

§ 3721. (§ 3141.) **Effect of breach of condition.**

Mental condition: Under evidence here there was no error in instructing jury as to effect of mental condition of plaintiff's intestate, grantor in conditional deed, upon his failure to act in regard to declaring forfeiture by reason of failure of grantee to comply with condition subsequent in deed conveying land to him. 148/794 (2) (98 S. E. 503).

Re-entry: Where grantor for valuable consideration conveyed fee simple estate and delivered possession, subject

to conditions subsequent, and thereafter conveyed same property by warranty deed to third person, and suit was brought by grantee in first deed (who had removed from land) to recover land then in possession of successors in title of grantee in second deed, fact that grantor made second deed will not raise presumption sufficient to establish re-entry by grantor and forfeiture of title conveyed by first deed. 147/622 (1) (95 S. E. 216).

CHAPTER 7.

Of Tenancy in Common.

§ 3723. (§ 3143.) **Definition of tenancy in common.**

Children: Will bequeathing and devising certain land to testator's daughter "and her children and to the exclusion of all other persons whatever, to her and her child and children all rights thereto appertaining,"

vested title in the daughter and such of her children as were living at the date of the will and at the death of the testator, as tenants in common. 140/430 (1) (78 S. E. 1067).

Deed conveying immediate estate,

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with present enjoyment, to woman and her children, vested title in woman and such children as she had in life, as tenants in common, and children thereafter born to her took no interest under deed. 141/793 (1) (82 S. E. 232).

Deed here from husband to his wife and children conveyed to them a tenancy in common for life of wife, with remainder to children as to her interest. 147/828, 829 (1) (95 S. E. 679).

Contract: Under contract set forth in petition here and the allegations there-

§ 3724. (§ 3144.) Rights and liabilities of co-tenants.

Conveyance by tenant in common of portion of the common estate by metes and bounds will be given effect as against the grantor and his privies, so far as may be done consistently with preservation of the rights of the other tenants in common. 141/424 (2) (81 S. E. 125); 142/385 (82 S. E. 1067).

Evidence: While under facts defendant was liable only for one-half the rents received by him, nevertheless evidence of value of premises, of quantity of crops ordinarily and generally grown thereon, and of fair and reasonable value of premises for rent, was admissible as tending to show amount actually received by defendant as rents. 149/225, 226 (2) (99 S. E. 884).

Homestead: On death of father prior to adoption of Constitution of 1868, leaving widow and children, his land vested in them as tenants in common, and any action of ordinary in 1869 in setting apart interest of children as homestead was void. 144/497, 498 (5) (87 S. E. 665).

Improvements: Co-tenant, acting in good faith and for purpose of honestly bettering property and not for purpose of embarrassing co-tenants in incumbering the estate or hindering partition, will be entitled to compensation to extent that his substantial and useful improvements have added to value of common property. 149/225, 227 (3) (99 S. E. 884).

Injunction will issue at instance of tenants in common who have been ousted by a cotenant. 140/430 (3) (78 S. E. 1067).

Landlord and tenant: Where one of two joint owners and tenants in common

of, there was neither a partnership between the parties nor a tenancy in common. 18 App. 479 (89 S. E. 631).

Definition: Tenants in common are those who hold by several and distinct titles but by unity of possession. 14 App. 121, 130 (80 S. E. 537).

Personal property: While technical expression, "tenants in common," applies to owners of realty, still where several own personalty in common, character of ownership is same. 14 App. 121, 130 (80 S. E. 537).

of property alleged to have been rented sued out distress warrant against other, and evidence did not show that relation of landlord and tenant existed, it was not error for court to grant nonsuit and dismiss the distress warrant, it not being proper remedy. 22 App. 95 (95 S. E. 323).

Pleading: General demurrer to petition here in action by administrator to have title to certain land decreed to be in him and to have accounting for rents, issues, and profits was properly overruled. 149/225, 226 (1) (99 S. E. 884).

Court did not err in overruling demurrer to petition for equitable partitioning of land alleging that petitioner and one defendant were tenants in common, that their interests were unequal, that defendant had never claimed one-half interest, that defendant had made warranty deed to other defendant, conveying all of his undivided interest in said land which deed was made to secure debt, and legal title to property was then in other defendant subject to payment of debt, that petitioner and defendant were in possession of stated acreage, that defendant threatened to tear down fence separating land occupied by each, and that there was bad feeling between petitioner's husband and defendant. 149/511 (101 S. E. 126).

Rent: Court properly charged that if jury found for plaintiff upon other issues in case, plaintiff would be entitled to recover one-half of rents actually received by defendant while he remained in exclusive possession of premises, and that jury would not con-

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sider defendant's interest as heir at law of his deceased wife in rents due to her estate; such interest was matter between administrator of cotenant and defendant on final accounting. 149/225, 227 (4) (99 S. E. 884).

Evidence here tended to show that amount received by defendant for rents included rent for live stock (the property of defendant) as well as for land,

and charge of court that defendant was liable to account for one-half of the amount actually received by him for rent of premises did not authorize jury to charge defendant with one-half of the gross sum received for use of land and live stock, and was not calculated to so impress the jury. 149/225, 227 (5) (99 S. E. 884).

§ 3725. (§ 3145.) **Adverse possession.**

Stated. 141/629, 630 (4) (81 S. E. 895).

Charge substituting the words "actual notice" for the words "express no-

tice," as used in this section, was not error. 140/240 (7) (78 S. E. 909).

§ 3727. (§ 3147.) **Accounting between co-tenants.**

Stated and applied. 141/629, 630 (9) (81 S. E. 895).

Executor: Cotenants may maintain suit to recover their share of common property from executor of deceased cotenant, who asserts adverse claim to the whole. 144/466 (87 S. E. 392).

Lien: Where father and son inherit property as tenants in common from deceased wife and mother, and father takes possession of all property owned by himself and son and uses it for his own benefit, son in equitable accounting has lien on such property for his

claim thereon, superior to liens placed on his interest by the tenant in possession receiving the property. 146/464 (3) (91 S. E. 476).

Set-off: Where father, though not a guardian, has property in his hands belonging to his son as co-tenant, the father, in an equitable accounting, on trial of claim case, had right of set-off against son for money expended for son while a minor where father was insolvent and such expenditure was necessary. 146/464 (4) (91 S. E. 476).

CHAPTER 8.

Of Trust Estates, Trusts and Trustees, and Deeds to Interests in Property for Its Improvement.

ARTICLE 1.

Of Their Creation and Nature.

§ 3728. (§ 3148.) **Definition.**

Burden of proof: Children of one of testator's daughters suing to recover an interest in land under a will bequeathing testator's estate to one of his sons in trust for testator's children and grand-children, must prove how many children testator left, in order to determine their mother's interest. 141/409 (1) (81 S. E. 117).

Life estate: Trust created by deed here was limited to life estate conveyed. 143/728 (1) (85 S. E. 891).

Clause in deed, "The intention of this deed is that the said S. shall hold all of said land during his natural life; then the title to vest in his heirs," conveyed the entire title in trust. 147/365 (1) (94 S. E. 237).

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Limitations: Where one tenant in common receives more than his share, limitations do not run against his liability to account to his cotenant for the surplus until he begins to hold such surplus adversely to his cotenant to the latter's knowledge. 141/629, 630 (9) (81 S. E. 895).

Remainders: Will here construed and held not to create trust in property devised for remainderman, though it stated that testator was willing to trust the remainderman to the care and bounty of his wife, the life-tenant. 142/366 (4) (82 S. E. 1071).

Where terms of conveyance by deed

§ 3729. (§ 3149.) **For whom.**

Stated. 140/554, 565 (79 S. E. 546).

Recording: Deed conveying property in trust for support of grantor, 72 years of age, and in feeble physical health, and his family consisting of son (grantee) and son's wife, and of children that may be born to grantee, and providing for legal disposition of property upon death of grantor and in event of grantee dying childless, is not subject to be set aside with decree for restoration of property, on petition of grantor alleging that deed is void because deed was not recorded within time prescribed and since its execution grantor had been restored to his mental and physical capacity. 149/601 (1) (101 S. E. 670).

Remainders: Mere fact that legal remainder over is made in instrument creating trust will not suffice to uphold the trust for one sui juris. 140/208 (2) (78 S. E. 844).

Spendthrift trust: Grounds for creation

§ 3733. (§ 3153.) **Express, etc.**

Improvements: Where two persons agree that they will jointly purchase tract of land for purpose of making thereon certain improvements, and that same are to be used for stipulated purposes, and for temporary purposes the legal title to the land is, by consent and acquiescence, made directly to designated persons as trustees for the joint purchasers, such agreement constitutes an express trust and must be declared in writing. 149/475, 476 (2) (100 S. E. 635).

to trustee are large enough to embrace fee, and this fee is carved up into estate for life with remainder to beneficiaries, uncertain and unascertained, instrument should be construed as clothing trustee with full title, and title as to remainder should be considered as abiding in him so long, at least, as identical persons who are to take and enjoy it are not ascertainable. 148/712 (1) (98 S. E. 472).

Support: Contract between two brothers by which, for certain consideration, one agreed to support his sisters, did not create trust in favor of sisters. 144/206 (86 S. E. 555).

of spendthrift trust ceasing beneficiary shall be possessed legally and fully of the same estate as was held in trust; and he may file proceeding in superior court of county where trustee resides to have trust annulled on that ground. 140/208 (3) (78 S. E. 844).

Sui juris: Deed conveying property in trust for support of grantor, 72 years of age, and in feeble physical health, and his family consisting of son (grantee) and son's wife, and of children that may be born to grantee, and providing for legal disposition of property upon death of grantor and in event of grantee dying childless, is not subject to be set aside with decree for restoration of property, on petition of grantor alleging that deed is void because it was thereby attempting to create trust for persons sui juris and not mentally weak or under legal disability. 149/601 (1) (101 S. E. 670).

Parol: Express trust can not be engrafted on deed by parol. 142/436 (1) (83 S. E. 122).

Express trust can not be created by parol, especially where it involves realty. 143/647 (85 S. E. 838).

Trust in favor of wife of bankrupt as to land conveyed to bankrupt and his wife by the latter's father cannot arise from oral declarations of bankrupt as to ownership of land. 261 Fed. 70, 71 (3); s. c. 171 C. C. A. 666.

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Express trust in realty cannot by parol evidence be engrafted upon conveyance of property. 147/373 (1) (94 S. E. 221).

Where two persons agree that they will jointly purchase land for purpose of making thereon certain improvements, and that same are to be used for stipulated purposes, and for temporary purposes legal title to the land is, by consent and acquiescence, made directly to designated persons as trustees for the joint purchasers, reformation of deed conveying land to third parties is not authorized, as express trust cannot be engrafted on a deed by parol. 149/475, 476 (3) (100 S. E. 635).

§ 3735. (§ 3155.) Resulting trust.

Fraud: Deed to a wife, executed at instance of husband, will not be modified or changed as to create resulting trust in husband, upon his petition praying that resulting trust be decreed for his benefit, and that deed to wife be cancelled as cloud on his title, because wife represented to him in parol that she did not desire title to property and would not exercise any control or

Petition, seeking to enforce alleged trust, was demurrable, where it failed to show express trust valid under this section, or implied trust under section 3739, or parol trust enforceable by plaintiffs. 143/647 (85 S. E. 838).

Pleading: Ground of amendment seeking reformation of alleged parol contract by decreeing remainder over to survivors so as to reform parol contract into express trust constituted error. 146/431 (1) (91 S. E. 405).

Court here, upon application of this section to facts stated in petition, properly sustained demurrer to so much of petition as sought to have debt due petitioner declared and decreed to be a trust debt. 149/45 (99 S. E. 29).

claim to it, which representations were false and fraudulent, and he having caused deed to be made to his wife with view to humoring her. 146/675 (92 S. E. 65).

Pleading: Facts alleged in petition here held not to show resulting trust in favor of plaintiffs, and petition was properly dismissed on demurrer. 148/88 (95 S. E. 961).

§ 3736. (§ 3156.) Execution of trusts.

Life estate: Devise to trustee in trust for another for life, and after his death to such child or children as he may leave surviving, and, in the event there shall be no such child or children, then to others named in the will share and share alike, created trust only for the life estate with legal remainder over, which trust became executed upon coming into existence if the life tenant were then sui juris, or as soon as he became so. 140/208 (1) (78 S. E. 844).

Trust created by deed here automatically became executed on grantee attaining her majority while unmarried. 144/115 (1) (86 S. E. 235).

Minor: Under will giving real property to testator's seven children, share and share alike, for the term of their natural lives respectively, with remainder in fee to their surviving lawful issue, if any, where son of testator survived him and died, his children took vested indefeasible interest in

one-seventh of such property, and as to such shares there was no active intervening trust, and those children who were of full age and sui juris were entitled to have the executors assent to the devise as to them and deliver to them their respective interests. 140/554 (2) (79 S. E. 546).

Instrument here created trust for benefit of grandchildren, which trust did not become executed during minority so as to authorize minors or a guardian on their behalf to recover from trustee undivided interest in a note given for their benefit or its proceeds, if collected; and it was not error to refuse injunction to restrain trustee from exercising control over funds, or from withdrawing them from bank, or receiving them from any other person with whom they might be deposited. 140/789 (2, 3) (80 S. E. 12).

Where testator bequeathed residue of his property to his executor in trust

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for his wife and any children born to her, to be kept until the youngest child became of age or married, or until the death or marriage of the widow, when it was to be distributed, the trustee was trustee for the remaindermen as well as for the life tenant. 142/163 (1) (82 S. E. 544).

Deed conveying certain realty to named person as guardian of minors, of certain county, naming them, created dry or passive trust, which would be executed as minors respectively reached majority. 144/732 (1) (87 S. E. 1055).

Deed which conveyed certain property to trustees in trust for certain named brothers and sisters of grantor and descendants of such brothers and sisters as might be dead at time of grantor's death, with power in trustees after death of grantor to distribute said estate in remainder to said brothers and sisters or their surviving children, deed reserving life estate, created a trust estate; it being contemplated that certain of those provided for as beneficiaries might be minors at time of grantor's death, trust was not immediately executed, but legal title passed to the trustees. 148/255 (1) (96 S. E. 431).

Prior conveyance: Where owner of land conveyed same to trustees, reserving

life estate, and subsequently made contract with third party that if latter would move upon the land and support her during her life she would give him the property, which offer was accepted, but the third party taking no written conveyance, and, after number of years, received notice of prior conveyance, but continued to reside upon the land and supported such owner until her death, such third party could not defend suit by trustees to recover land on ground that he was bona fide purchaser for value and had title to property. 148/255 (2) (96 S. E. 431).

Unborn children: Deed conveying property in trust for support of grantor, 72 years of age, and in feeble physical health, and his family consisting of son (grantee) and son's wife, and of children that may be born to grantee, and providing for legal disposition of property upon death of grantor and in event of grantee dying childless, is not subject to be set aside with decree for restoration of property, on petition of grantor alleging that deed is void because grantee and wife (aged 36 and 34 years) have been married for number of years, no child has been born of the marriage, and there is no probability of child being born. 149/601 (1) (101 S. E. 670).

§ 3737. (§ 3157.) Executed and executory.

Applied. 140/554, 563 (79 S. E. 546).

Life estate: Devise to trustees for use of testator's daughters during life and after their death to their children, respectively, and in case of death of daughter without children her share to go to survivors subject to such trust, created trust which was executory at least until death of life tenant, when possibility of her having children would become extinct, and it could be ascertained to whom estate would ultimately go. 148/376, 377 (1) (96 S. E. 863).

§ 3738. (§ 3158.) Use upon use.

Stated. 140/554, 565 (79 S. E. 546).

Petition: Where contract creates trust and plaintiff is entitled to have same executed by trustee's turning over to him for life the corpus as trust estate to be safely guarded, he should institute appropriate proceedings, and not sue on the entire contract and at the same time ask for a money judgment. 143/20 (84 S. E. 64).

Sui juris: Trust estate cannot be created in property for benefit of persons sui juris. 146/196 (2) (91 S. E. 12).

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§ 3739. (§ 3159.) **Implied trusts.**

1.

Administrator's sale: Where two persons orally agreed that one of them should be purchaser of land at administrator's sale, and that when he received deed he would, upon payment to him by other of certain sum in cash, and delivery of certain notes, execute bond conditioned to convey land on payment of notes, there was no resulting trust. 146/822 (92 S. E. 635).

Consideration: Trust will be implied, if, after receiving money to buy land, the recipient uses the money for other purposes, and, substituting his own money for that furnished to him, pays for the land, intending to make the payment for the other person. 140/640 (4) (79 S. E. 572).

Resulting trust arising from payment of purchase-price is not created, unless price is paid either before or at time of purchase. 140/765 (3) (79 S. E. 852).

Where A and B jointly buy land, each paying one-half of purchase money, and title is taken in name of third party, trust in favor of A and B will be implied; and where B subsequently goes into possession to exclusion of A, court of equity will decree A to be tenant in common with B to extent of one-half undivided interest. 149/475 (1) (100 S. E. 635).

Petition alleging that plaintiffs and deceased brother had agreed to buy and hold certain land in common, that plaintiffs had made payments, not knowing that title was in deceased individually, with prayer for enforcement of trust, stated cause of action to enforce implied trust. 146/431 (3) (91 S. E. 405).

Resulting trust which arises solely from payment of purchase price is not created unless purchase price is paid either before or at time of purchase. 146/822 (92 S. E. 635).

Where purchaser of land took bond for title, and being unable to pay balance of price agreed with third person that latter should pay balance, that he and original purchaser should own land as tenants in common, and that deed should be taken conveying

property to them, and third person had property conveyed to stranger and by latter reconveyed to himself, implied trust arose in favor of original purchaser, who had surrendered his bond for title, and he was entitled to decree establishing his right as tenant in common and owner of undivided one-half interest in property. 148/770 (1) (98 S. E. 262).

Where note of merchant was sent through bank for collection, and he wrote to original payee, inclosing new note for amount due and requesting payee to help him along and send check in time to pay note, and check was sent with statement that it was to take care of such note, and check was deposited to his credit, amount so received constituted trust fund, and was not subject to garnishment by other creditors. 19 App. 61 (90 S. E. 975).

Guardian: Where infant sought to establish resulting trust in land belonging to her mother's estate purchased by her uncle, who subsequently became her guardian, there being no fiduciary relation between parties at time of purchase and no contractual relation of principal and agent, refusal of instructions based on theory existing fiduciary relation was proper. 146/528 (1) (91 S. E. 772).

Where one was guardian for his children and had funds in his hands belonging to them, if he used such funds to purchase lands, though he took deed conveying land to himself, equity would impress property with a trust character in favor of the children, in suit brought by them for purpose of having trust declared. 149/371 (1) (100 S. E. 101).

If guardian bought lands with funds which he procured by effecting loan from third person, or in any way independently of trust funds, and with borrowed money purchased land, though he might have subsequently used trust funds to repay loan, no trust was fastened upon the property, unless borrowing was done with intent to subsequently repay it with trust funds. 149/371 (1-a) (100 S. E. 101).

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Fact that guardian had used funds belonging to his children to make improvements upon land which he had purchased in his own name would not have effect of creating implied trust upon property thus improved. 149/371 (2) (100 S. E. 101).

Husband: Where, before married woman's act, married woman received gift of money from her father and delivered it to her husband to buy home, which he bought, taking title in his own name without her consent, such title was impressed with an implied trust in her favor. 143/607 (2) (85 S. E. 852).

If husband uses money of wife, with or without her consent, and thereby acquires title in himself to property, third persons who bona fide take title for value to such property will be protected. 145/184, 185 (7-a) (88 S. E. 949).

Where father made voluntary conveyance of land to his daughter and her husband, who later became bankrupt, there being no circumstances having the effect, as between husband and father, of preventing husband's acquisition of an interest in the land as a gift from the father, the interest vested in the husband was not charged with trust in favor of daughter. 261 Fed. 70 (2); s. c. 171 C. C. A. 666.

Equitable petition containing no specific allegation that petitioner's earnings prior to marriage actually constituted the purchase money, or any part thereof, of real estate referred to, failed to allege essentials of resulting trust. 148/25, 27 (2) (95 S. E. 673).

Where husband, acting as agent for wife, exchanged tract of land belonging to her for another tract, but took title in himself to land so purchased, wife, upon discovering such fact, would be entitled to have resulting trust declared. 147/657 (1) (95 S. E. 238).

Petition here, in suit to establish resulting trust in land purchased by husband for his wife since deceased, was defective as to description of land. 147/657, 658 (4-a) (95 S. E. 238).

Petition here in suit to establish resulting trust in land purchased by husband for wife since deceased was defective in failing to distinctly allege and setting forth clause of conveyance

of interest in property to petitioners; allegations were inconsistent, irreconcilable, and confused. 147/657, 658 (4-b) (95 S. E. 238).

Petition here in suit to establish resulting trust in land purchased by husband for wife since deceased was defective in that prayers for relief were utterly irreconcilable, conflicting, and confused as to quantity of interest in land claimed by petitioners and the time of its enjoyment, and as to remedy sought. 147/657, 658 (4-c) (95 S. E. 238).

Where funds of married woman are invested in land by her husband, who takes deed from vendor in his own name, husband, under such circumstances, will take only the legal title, equitable title being in the wife. 148/112 (1) (95 S. E. 968).

Where husband holding legal title to land in which he had invested funds belonging to his wife, without any new consideration, makes deed conveying property to his wife for life, with remainder to her children by him, and if there be none then to his heirs at law, and wife accepts deed and retains possession thereunder, such deed is binding upon wife, unless attacked for fraud or other legal cause. 148/112 (2) (95 S. E. 968).

Where wife makes no attempt to set aside deed to her from her husband conveying lands in which he had invested her funds to her for life, with remainder to her children by him, but makes will purporting to dispose of her property generally in manner different from that provided by the deed, and devisee, being person not alleged to be one who would take under the deed, seeks to recover interest in land embraced in the deed, and in his petition sets out the deed, but does not seek to reform it or attack it for fraud, there is no error in dismissing the petition on general demurrer. 148/112 (3) (95 S. E. 968).

Where wife advances money to husband which is used in paying purchase price of land and in making improvements thereon, and wife sues husband for such money and obtains judgment, her election thus exercised to treat obligation of husband as debt will bar her from setting up equitable interest

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in the land on basis of implied trust, or upon basis of having purchased from her husband, with the money, an interest in the land. 148/146 (2) (95 S. E. 968).

Where husband buys land and takes title in his own name, wife can not in equity establish implied trust and recover undivided interest in such land by showing that portion of purchase price was paid from fruits of her labor; she must show that some definite portion of the purchase price was paid by her from her separate estate. 149/581 (101 S. E. 582).

Investment: Nonsuit was error in suit for accounting, where plaintiffs' petition and evidence showed that they had obtained an option to purchase land, that defendant furnished the money, that the profits were to be divided, that defendant took title to the land, denied any interest in plaintiffs, and resold the land. 18 App. 631 (90 S. E. 74).

Option: Where, in action for partnership accounting, auditor found that property devised was impressed with implied trust in favor of partnership,

2.

Creditors: Transfer of substantially all the assets of debtor company was fraud on creditors such as made transferee company trustee ex maleficio as to such creditors to extent of value of assets. 143/254 (84 S. E. 444).

Heir: Insanity or incapacity to contract on part of mother will not furnish cause for her son, who claims to be her prospective heir, to maintain during her life an action to reform deed made by her, or to obtain decree impressing with trust in her favor property conveyed. 145/103 (2) (88 S. E. 564).

Illiterate person: Where illiterate person conveyed property to wife in reliance on false statements of her and her father, and the wife sold the property, the father was necessary party to action to compel them to turn over

option given plaintiff of confirming legal title by payment of purchase money was not subject to criticism. 147/178, 179 (3) (93 S. E. 289).

Pleading: Dismissal of petition in suit to declare plaintiffs owners of half interest in certain land, legal title to which was in defendant, but which it is alleged defendant took with knowledge of the equitable rights of plaintiffs, for failure to show any equitable right in plaintiffs, was proper. 142/201 (82 S. E. 545).

Where verdict and decree awarded plaintiffs entire interest in certain land, and under the pleadings and evidence they were entitled to only a two-third's interest, judgment must be reversed. 146/431 (4) (91 S. E. 405).

Petition here construed and held to set forth cause of action for recovery of plaintiff's share or pro rata part of proceeds arising from sale of parcels of land sold by defendant; for reformation of deed executed by plaintiff to defendant in so far as it affected his undivided interest in the land not disposed of by defendant; and for injunction. 148/499 (97 S. E. 71).

proceeds of sale, part of which the father held. 142/357, 358 (2) (82 S. E. 1057).

Sheriff's sale: Plaintiff in execution who, at instance of defendant in execution in possession of land under deed, bids off land at sheriff's sale, under parol agreement with defendant that he will buy in land and take sheriff's conveyance for benefit of defendant and allow defendant to redeem upon payment of judgment, and who discourages bidding by stating that he is bidding in behalf of defendant, holds as trustee for latter such title as he derives from sheriff, and, on being paid or tendered amount of judgment with interest, may be compelled by decree to convey premises to defendant in execution by release or quitclaim deed. 149/727 (2) (102 S. E. 27).

General Note.

Agreement to make will: Where one who promised to make a will with devise of specific property, as com-

pensation for services, makes will, which is probated, devising such property to a third person, equity will im-

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press a trust upon the property which will follow into hands of personal representative or devisee of promisor. 145/682 (2) (89 S. E. 749).

Petition, seeking to enforce alleged trust,

was demurrable where it failed to show express trust valid under section 3733, or implied trust under this section, or parol trust enforceable by plaintiffs. 143/647 (85 S. E. 838).

§ 3740. (§ 3160.) **Between near relatives gift presumed.**

Parent: Where, in action to establish resulting trust, plaintiffs did not prove that they paid any definite part of the purchase-price of land, title to which

was taken in their mother's name, who devised it to defendant, evidence was insufficient. 142/436 (2) (83 S. E. 122).

§ 3741. (§ 3161.) **Parol evidence.**

Judgment: Where owner of property conveys to another against whom there is valid outstanding judgment at time, for sole purpose of putting title in grantee so that he may sell or pledge property for purpose of raising money to pay over to owner, lien of judgment will not attach and make property subject as against claim duly filed by owner of equitable interest. 148/410 (1) (96 S. E. 872).

Parent: Parol testimony is admissible to show that landowner conveyed to his

mother merely to enable her to convey to his daughter. 146/421 (1) (91 S. E. 469).

Petition here construed and held to set forth cause of action for recovery of plaintiff's share of pro rata part of proceeds arising from sale of parcels of land sold by defendant; for reformation of deed executed by plaintiff to defendant in so far as it affected his undivided interest in the land not disposed of by defendant; and for injunction. 148/499 (97 S. E. 71).

ARTICLE 2.

Of Trustees; Their Appointment, Powers, etc.

§ 3743. (§ 3163.) **Trustees appointed, etc.**

Existence of trust: Appointment of trustee at time when no trust existed was inoperative, and did not authorize

him to bring suit as trustee. 144/115, 116 (2) (86 S. E. 235).

§ 3744. (§ 3164.) **Proceeding at chambers.**

Life tenant, though one of the beneficiaries under a conveyance in trust, was legally qualified to be trustee, at least for other cestuis que trust, under appointment of judge of superior court. 148/712 (3) (98 S. E. 472).

Removal: Where contrary does not appear from record, it will be presumed that judge of superior court, in removing trustee under a deed and appoint-

ing a successor, acted with all necessary jurisdictional requisites. 148/712 (4) (98 S. E. 472).

Vacancy: Where there was valid trust as to entire fee in premises, removal of trustee created vacancy which judge of superior court was authorized to fill by appointment of successor at chambers. 148/712 (2) (98 S. E. 472).

§ 3751. (§ 3168.) **Returns to ordinary.**

Public trusts: Trustees whose duty it is to manage religious, charitable, educational, or other public trusts, are not

required to make returns to the ordinary. 146/68 (1) (90 S. E. 382).

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§ 3753. (§ 3170.) **Duty of trustees.**

Expenses: It was not error to allow trustee reimbursement from trust estate for expenses in defending action to set

aside trust deed. 149/601 (3) (101 S. E. 670).

§ 3754. (§ 3171.) **Power of sale extends to what.**

Fee-simple: Power of sale in trust deed empowering the trustee as often as he may think and deem best, to sell and reinvest proceeds or to exchange the same and execute titles therefor and to receive and accept titles, all to be done without any order of court, authorized trustee to sell entire estate in land, and hence substituted trustee conveyed fee simple title to grantee by her deed. 148/712 (5) (98 S. E. 472).

Life estate: Provision of trust deed empowering trustee to sell trust estate conferred power to sell interest of life tenant in land in which she had reinvested the trust fund, and pur-

chaser at second sale and his successors acquired title to life estate. 147/5, 6 (3) (92 S. E. 514).

Personal trust: Power conferred on person, who, at time of exercise thereof, may hold particular office, attaches to individual and not to office. 143/756 (3) (85 S. E. 917).

Pleading: Under allegations of petition here praying cancellation of deed and that petitioner recover possession of lands conveyed by such deed, petitioner was not entitled to relief prayed for, and court did not err in dismissing the petition on demurrer. 148/117 (95 S. E. 980).

§ 3755. (§ 3172.) **Sales by trustees.**

Chambers: Where executrix, as trustee and guardian, was authorized to sell land without order of court, it was immaterial whether order authorizing sale was legally obtained in vacation. 142/147 (82 S. E. 539).

Judge of superior court had jurisdiction at chambers to order sale of trust estate, on petition of trustee. 146/536, 537 (2) (91 S. E. 556).

Construction: Deed by trustee construed as if language of will appointing executrix trustee of the property was incorporated therein. 142/147 (82 S. E. 539).

Order: Where will vested in executrix, as trustee and guardian, full power to sell testator's property, she was authorized to sell and execute conveyance without order of court. 142/147 (82 S. E. 539).

Where will created life estate in widow of testator, with remainder to his children, and widow, who was named as executrix, sold property of estate at private sale without order authorizing sale, her deed conveyed only the life estate, and did not divest

the children of their interest in the remainder. 148/44 (2) (95 S. E. 682).

Prescription: Where interest of a life tenant in land was sold by trustee who represented both the life and remainder interests, prescription began to run in favor of the buyer and his successors in title from the date of the purchase. 148/376, 377 (4) (96 S. E. 863).

Remainder: Deed of land in trust for grantor's daughters for life, with remainder to their children, on death of one without children to vest in other daughter, or in case of her death in her children, and on death of both without children to grantor's other children, created trust beyond daughter's life estate, and embraced the estate in remainder given to children of daughters who might survive their parent. 146/536 (1) (91 S. E. 556).

Where application for leave to sell land was solely as trustee for life tenant, order authorizing sale applied only to the life estate. 148/376, 377 (3) (96 S. E. 863.)

§ 3762. (§ 3179.) **Purchaser with notice.**

Record of a deed to a wife as trustee for her children, which deed was made

by the purchaser at an invalid sheriff's sale, was not constructive notice to a

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subsequent purchaser from the husband and wife as individuals, where they held title prior to the sheriff's

sale and remained in possession thereafter. 141/65, 66 (4) (80 S. E. 462).

§ 3765 (a). **Lawful investments for fiduciaries, insurers, etc.** [Farm loan bonds issued by federal land banks or joint stock land banks, under an Act of Congress approved July 17th, 1916, entitled "An Act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories and financial agents for the United States, and for other purposes," shall be lawful investments for savings bank deposits, for all fiduciary and trust funds, and for the funds of insurance companies and savings and loan associations. Said farm loan bonds shall be accepted as security for all public deposits on the same terms as any bonds for which the faith of the United States is pledged.]

Acts 1918, p. 160.

§ 3768. (§ 3184.) **Following funds.**

Parties: Where illiterate person conveyed property to wife in reliance on false statements of her and her father, and wife sold the property, the father

was necessary party to action to compel them to turn over proceeds of sale, part of which father held. 142/357, 358 (2) (82 S. E. 1057).

§ 3770. (§ 3168.) **Lien.**

Cited and applied. 145/608, 610 (89 S. E. 681).

§ 3774. (§ 3190.) **Acceptance of trust.**

Cited and applied. 145/608, 610 (89 S. E. 681).

§ 3775. (§ 3191.) **Extent of trustee's estate.**

Fee simple: Under will giving land to son in trust for his wife and her children, and at his death to be property of his children, the children took a vested interest in the property devised during life of trustee, becoming fee simple estate upon his decease. 146/784 (92 S. E. 531).

Heirs: Where children of testamentary trustee took vested interest in property devised, which interest consisted of equitable title during his life, becoming fee simple estate upon his decease, heirs of trustee's children would inherit interest of such children who predeceased trustee and died intestate. 146/784 (92 S. E. 531).

Life estate: Under will giving land to son in trust for his wife and her chil-

dren, and at his death to be property of his children, the gift over did not prevent interest of the children from becoming vested upon death of trustee, but operated to postpone enjoyment of full fee simple title until death of such trustee. 146/784 (92 S. E. 531).

Remainder: Estates in remainder are purely legal, so that trust created by deed here did not apply to them. 144/115 (1) (86 S. E. 235).

Deed of land in trust for grantor's daughters for life, with remainder to their children, on death of one without children to vest in other daughter, or in case of her death in her children, and on death of both without children to grantor's other children, created trust beyond daughters' life estate,

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and embraced the estate in remainder given to children of daughters who might survive their parent. 146/536 (1) (91 S. E. 556).

Under trust deed creating in grantee life estate, with remainder to her surviving children, trustee represented only the life estate and not the re-

mainder interest. 147/5, 6 (1-a) (92 S. E. 514).

Construing order of court appointing trustee, in connection with petition here, appointment extended to entire estate, and appointee became trustee for life tenant and remaindermen. 148/376, 377 (2) (96 S. E. 863).

§ 3777. (§ 3193.) **Compensation.**

Expenses: It was not error to allow trustee reimbursement from trust estate for expenses in defending action

to set aside trust deed. 149/601 (3) (101 S. E. 670).

§ 3778 (a). **Requirement of bond where excused by creator of trust.** [In all cases where a trust for minors, or persons sui juris, or spendthrifts, has been created by will, deed, contract or otherwise, and the trustee is by said creative instrument excused from giving bond, [or is not required to give bond,] (a) that the cestui que trust, or his personal or property guardian, may, as a matter of protective right, require a good and solvent bond to be given by said trustee, payable to the ordinary of the county of said cestui que trust's residence, in double the value of the personal property held by said trustee.]

Acts 1918, pp. 234, 235. (a) Acts 1919, p. 384.

§ 3778 (b). **Rule nisi and rule absolute; suit for breach.** [Upon application of the cestui que trust by petition to the superior court of the county of the residence of such trustee, setting forth the trust, and the terms on which the same is held, the judge of said court shall issue a rule nisi directed to the said trustee, requiring him to answer, under oath, the value of the personalty held by him, together with an itemized statement thereof, and upon it being made to appear upon the hearing that such trustee has in his possession personal property, of which the cestui que trust is the beneficiary, and that the trustee is acting as such without bond, the court shall pass a rule absolute, requiring the trustees within twenty days to execute and deliver to the ordinary of the county of the residence of the cestui que trust a good and sufficient bond, [to be approved by said ordinary,] (a) in double the value of the personal property so held by said trustees, conditioned to faithfully account for the trust property in his hands, together with the income therefrom, in conformity to the terms of the trust. And for any breach of such bond, suit may be maintained in the name of the ordinary suing for use of the beneficiary of said trust. A copy of said petition, together with the rule nisi thereon, shall be served upon the trustee not less than ten days, nor more than thirty days, before the hearing thereon. The hearing on said rule

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nisi may be before the judge, either in open court or at chambers, and may be had either in term time or vacation.]

Acts 1918, p. 235. (a) Acts 1919, p. 385.

§ 3778 (c). **Trusts to which applicable.** [The provisions of this law shall apply to all trusts heretofore created, as well as any that may hereafter be created in this State.]

Acts 1918, p. 236.

§ 3778 (d). **Removal; delivery to new trustee; contempt.** [Should the said trustee fail to comply with said rule absolute, and file and have approved said bond within the time stated, then he shall be removed from said office of trustee by the judge of the superior court, and a new trustee shall be named by the judge, who shall give bond as ordered, and the judge of the said court shall order the removed trustee to immediately deliver to such new trustee the trust property in his hands. For a failure to comply with this order, he shall be held and adjudged in contempt of the court.]

Acts 1918, p. 236.

§ 3778 (e). **Costs and premium.** [The costs of court, as well as the expenses and annual premium upon said bond, shall be paid by the trustee from the funds in his hands as such trustee.]

Acts 1918, p. 236.

§ 3778 (f). **Ordinary's fee.** [The ordinary of the county receiving, filing, approving and recording said bond shall be entitled to a fee of two dollars, to be paid by said trustee.]

Acts 1918, p. 236.

§ 3778 (g). **Record.** [The petition, answer and orders of the superior court heretofore provided for shall be recorded in full on the minutes of said court, and the bond provided for shall be recorded by the ordinary approving the same on the minutes of his court.]

Acts 1918, p. 236.

§ 3778 (h). **Annual returns; removal on default.** [The said trustee shall annually on or before the first day of May, after the giving of said bond, file with the ordinary of the county where said bond is recorded, a full statement of all receipts and disbursements, and a full statement and schedule of all property in his hands as such trustee, which report shall be verified by the oath of said trustee. And upon failure to so file the said statement he shall be removed by the judge of the superior court of the county of his residence, upon petition of the cestui que trust, or his personal or property guardian, and a new trustee shall be appointed

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by said court, and said court shall order the old trustee to deliver to said new trustee all property of the estate in his hands, and for failure so to do, said old trustee shall be held and adjudged in contempt of court.]

Acts 1918, p. 236.

§ 3778 (i). **Compensation.** [Nothing in this law shall be construed to change, modify or increase the compensation of trustees, either as now provided by law or as may be provided for by the instrument creating the trust.]

Acts 1918, p. 237.

ARTICLE 3.

Of Trusts and Trustees.

§ 3780. (§ 3196.) **When court will declare one a trustee.**

Cited and applied. 140/640, 647 (79 S. E. 572).

§ 3782. (§ 3198.) **Limitation.**

Continuing: Trusts intended by courts of equity not to be reached or affected by statute of limitations are those technical, continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of courts of chancery. 147/77 (92 S. E. 890).

Guardian: Suit by persons named as minors in deed conveying to certain person as their guardian, to recover interest conveyed under trust deed from purchaser at foreclosure sale in 1902, when he went into adverse possession and so remained until commencement of suit in 1914, was barred by limitations. 144/732, 733 (2) (87 S. E. 1055).

Husband: That petition by wife against her husband and trustee to enforce her rights under deed vesting title in her after three years if the husband should be guilty of misconduct was not brought for five or six years after such three years did not bar her right to recover, where she had been in undisturbed possession, and did not discover her husband's misconduct until a short time before action was brought. 141/448, 449 (1-f) (81 S. E. 118).

Where husband who invested wife's separate estate recognized it as trust for her so long as she lived, and after

her death for use of her heirs at law so long as he lived, limitations as against demand for accounting would not be applicable, but where husband's administrator attempted to administer all property left by his intestate, limitations would begin to run in favor of the administrator, and suit for accounting commenced against administrator more than ten years thereafter would be barred. 147/235 (2) (93 S. E. 411).

Action by wife's administrator with will annexed against administrator of husband for accounting as to money received by husband from wife's separate estate, between 1878 and 1903, and invested in lands in his own name, and other money not so invested, and for which accounting had been demanded by wife, brought in 1917, after death of wife in 1913 and death of husband in 1917, was not barred by statute where husband recognized wife's right until his death. 149/600 (2) (101 S. E. 578).

Passive trust: Prescription will run against trustee of passive trust in favor of purchaser of realty at foreclosure sale, from date of sale and adverse possession thereunder, though beneficiaries were minors. 144/732 (1) (87 S. E. 1055).

 Claims against trust estates.

§ 3784. (§ 3200.) **Misapplying trust funds.**

Transferees: Where agent for purchase and resale of property fraudulently represented that purchase-price was much higher sum than it really was, and he caused deed to be made so as to convey part of land to an uncle, who paid nothing, the uncle in turn conveying his interest to the agent's

father, who later conveyed to purchaser for value, the agent receiving the proceeds of this sale, the uncle and father were liable, if they had knowledge of the fraud, to account to the principals. 145/750, 751 (7) (89 S. E. 1071).

§ 3785. (§ 3201.) **Tracing assets.**

Remaindermen: Where devise was to A for life, with remainder to children of A, and executor in other State sold personalty in the other State, and from proceeds advanced money to A and her husband, taking from them mortgage on other separate property of A in the estate, conditioned upon repayment to the executor of amounts so advanced when A should die, and after having thus procured money A invested it in lands in this State, to which she took

absolute fee simple deed, title to such lands was A's absolutely, unaffected by any right of remaindermen. 146/464 (1-a) (91 S. E. 476).

Where life tenant in personalty under foreign will took proceeds of sale advanced to her and acquired land in this State absolutely unaffected by any rights of remaindermen, it descended on her death to her husband and her son as her heirs. 146/464 (2) (91 S. E. 476).

 ARTICLE 4.
Claims Against Trust Estates.§ 3786. (§ 3202.) **Claims against a trust estate, etc.**

Cited. 13 App. 42, 47 (78 S. E. 869).

General Note on Trustees.

Parties: That a trustee was named in a deed from husband to trustee for benefit of wife did not preclude wife from bringing action in her own name to enforce her rights under the deed. 141/448, 449 (1-h) (81 S. E. 118).

When title to trust property is in named trustees, though they appear to represent unincorporated religious association, proceeding to foreclose mortgage executed thereon by them, in order to subject property to debt for which it is liable, may be brought under this section, and to such action the trustees are the only necessary parties. 149/668 (101 S. E. 792).

Petition: Where petition in suit against unincorporated church contained two counts, one founded on contract and the other based on quantum meruit, but failed to describe any property or to assert a lien thereon, and declaration did not set up a claim against a trust estate, under this and the following sections, attempt by plaintiff by amendment to set up lien against certain lot of land and to follow proceeds of sale of that particular lot into another lot subsequently purchased added a new and distinct cause of action to the original petition, subjecting it to demurrer. 22 App. 696 (2) (97 S. E. 102).

SEVENTH TITLE.

Of Title and Mode of Conveyance.

CHAPTER 1.

Of Title by Grant.

ARTICLE 1.

Grants Generally.

General Note on Grants and Headrights.

Headright laws: After repeal of the headright laws by Acts 1909, page 115, an applicant could not, by amendment to an application filed before such repeal, enlarge the scope of his application by reason of an increase in his family subsequent to such repeal. 141/148 (80 S. E. 654).

Where application for warrant, under the headright law, was caveated by an adjacent owner, and the issues made

were transmitted to the superior court, where the evidence considered with the application insufficiently described the land to authorize issuance of warrant, nonsuit was properly granted. 141/388 (81 S. E. 198).

Plat: Where a grant of land referred to a plat as furnishing the description of the land, the plat controlled as to boundaries. 141/153 (2) (80 S. E. 657).

ARTICLE 3.

Processioning.

§ 3817. (§ 3243.) Appointment of processioners.

County: Sections 3817 et seq. apply to land having county line as one of its boundaries. 143/705 (1) (85 S. E. 844).

Writ of error will not lie to Supreme Court to correct judgment of superior

court in a proceeding of processioning land, and where writ of error in case of that character is brought to Supreme Court, it will be transferred to Court of Appeals. 146/647 (92 S. E. 51); 148/311 (2) (96 S. E. 561).

§ 3818. (§ 3244.) What is processioning.

Ejectment: Processioning proceeding is a summary proceeding, and is not designed to be a substitute for an action of ejectment. 140/245, 247 (78 S. E. 905).

Evidence: Where land was described by bounds, in litigation between the grantor and a transferee of the grantee, the grantor could testify that the boundaries of such land as conveyed by him were agreed to and marked out

and a practical location made. 142/115, 116 (2) (82 S. E. 520).

Where there was evidence that plat attached to protest to return of processioners as an exhibit was correct representation of the property conveyed, it was properly admitted. *Id.* 115, 116 (3).

Injunction: Location of dividing line between co-terminous owners by statutory proceeding of processioning is not

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necessary preliminary to action to enjoin alleged trespass, notwithstanding such disputed land must be ascertained in determining whether trespass was committed on plaintiff's land as described in petition. 147/148 (2) (93 S. E. 81).

New line: Established lines and not new ones should be fixed and determined;

§ 3819. (§ 3245.) Surveyor's duty.

Certified plat: Certified copy of plat by county surveyor in processioning proceeding is prima facie, not conclusive, evidence of the true line between adjoining landowners. 145/52 (1) (88 S. E. 545).

Charge: This section is inapplicable to the issue before the court formed by a protest to the processioners' return, but the giving of this section in a charge was not prejudicial to the los-

§ 3820. (§ 3246.) Rules in disputed lines.

Agreed line: Disputed boundary line between co-terminous proprietors may be established by oral agreement if the agreement be accompanied by actual possession to the agreed line, or is otherwise duly executed. 142/448, 449 (7) (83 S. E. 200).

Charge: Where facts showed prescriptive title in plaintiff, and defendants failed to show that any of land in dispute was covered by deeds introduced by them, and failed to show possession by any of the grantors, it was error to charge in regard to law applicable to disputed land-lines between co-terminous owners. 146/439 (1) (91 S. E. 407).

Corners: Instruction that if post was in the same place, or approximately same place, as the original post, that would be the true corner was erroneous. 143/73 (1) (84 S. E. 434).

Though course and extent of line itself may not have been actually marked out upon earth's surface, yet, if there should exist sufficient number of physically established corners or landmarks, mere connecting of which by straight lines, or from which the projecting of courses and distances shown by plat would suffice to complete boundary, it would be duty of processioners, in accordance with this

the location of lines, not as they ought to be, but as they actually exist, is to be sought. 140/360 (78 S. E. 1057).

Fixing new lines is not within power of processioners, whose vocation is to seek and find lines already existing, and to run and mark them again. 20 App. 737 (1) (93 S. E. 236).

ing party, because in the trial of an issue formed by a protest the return of processioners is to be deemed prima facie correct. 140/245, 246 (4) (78 S. E. 905).

Plat showing lines run around land of Mrs. O., and not around that of O., applicant in processioning proceedings, return of processioners, to which plat was attached, not admissible. 140/44 (78 S. E. 420).

section, so to ascertain, mark, and establish the same, respecting always the rights had under actual possession as defined by section 3822. 21 App. 604 (1) (94 S. E. 824).

Deed: Where it becomes material to locate line between land in controversy and that of an abutter, deed of such abutter to one of the defendants, conveying abutting land and so describing line that its physical location is ascertainable, is admissible. 146/490 (4) (91 S. E. 675).

Description: Muniments of title accompanied by diagrams or plats which might on paper sufficiently describe and designate lines and boundaries of realty so as to render their ascertainment certain will not of themselves afford the proper basis for the services of processioners. 21 App. 604 (1) (94 S. E. 824).

Duty of processioners in fixing and marking anew established lines is not to locate them as they originally ought to have been laid out, but only to fix and determine the boundaries as they actually exist. 21 App. 604 (1) (94 S. E. 824).

Evidence: Where no connection was shown between plaintiff and third person, witness' testimony as to the line to which he cut timber while in em-

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ploy of such third person was inadmissible. 143/73 (4) (84 S. E. 434).

Monuments: Where a deed refers to well-defined boundaries, the boundaries or

monuments must prevail, regardless of whatever else the deed may contain as to course and distances. 22 App. 388, 391 (95 S. E. 1006).

§ 3821. (§ 3247.) **General reputation, when evidence.**

Cited. 146/473, 474 (91 S. E. 553).

Acquiescence: Line established by seven years acquiescence is binding on grantees or co-terminous proprietors. 141/597, 598 (2) (81 S. E. 860).

Unascertained or disputed boundary line may be established either by oral agreement accompanied by actual possession, or by acquiescence for seven years by acts or declarations of owners of adjoining land. Id.

Where principle that acquiescence for seven years, by acts or declarations of adjoining landowners, shall establish dividing line, is applicable under the evidence, and the court undertakes to give it in charge to jury, omission of the words, "by acts or declarations of adjoining land owners," is material error. 148/62 (1) (95 S. E. 709).

Acquiescence by conduct for period of time less than seven years will not suffice to establish dividing line between adjoining landowners. 146/309, 370 (2) (91 S. E. 114).

Where, under pleadings and evidence, there was question of whether a line had been established by acquiescence by acts and declarations of parties or their predecessors, or by actual possession of defendants and their predecessors for term of seven years, it was duty of court, without request, to charge law on such subject. 148/721, 723 (7) (98 S. E. 543).

Charge applying rules laid down in sections 3821 and 3822 not cause for new trial because court referred to time of

acquiescence and actual possession as "a term of years as the law prescribes" and "a number of years," where in immediate connection therewith he also instructed in the language of such sections that acquiescence or actual possession must exist for seven years. 140/245 (2) (78 S. E. 905).

Charge here defining acquiescence was not erroneous. 143/95 (1) (84 S. E. 370).

Under evidence here court should have charged that acquiescence for seven years by acts or declarations of adjoining owners shall establish dividing line. 144/147 (1) (86 S. E. 315).

Charge was erroneous, where it deprived defendant of defense based on plaintiff's acquiescence in line which defendant insisted was the true line. Id.

Where principle of law embodied in this section is applicable under the evidence, and court undertakes to give it in charge to jury, it should be given substantially if not literally; this requirement was not met where words "by acts or declarations of adjoining landowners" were omitted from charge. 147/224 (1) (93 S. E. 199).

Co-terminous owners: Where co-terminous landowners, by parol agreement, fix line between them and exercise acts of ownership over their respective tracts up to the agreed line, one of them will not afterwards be heard to deny his assent to the agreement. 146/473 (1) (91 S. E. 553).

§ 3822. (§ 3248.) **Adverse possession.**

Agreed line: Charge that parol agreement between co-terminous owners as to boundary line operates to establish a line where the boundary line is unascertained, unsettled, and not agreed to between the parties, and is disputed, was not erroneous as amounting to ruling that parol agreement was not binding unless line was disputed, notwithstanding it may have been un-

ascertained or unsettled and not agreed to between the parties. 148/616 (1) (97 S. E. 676).

Parol agreement between two adjoining landowners that certain road should be dividing line between them is valid and binding as between them, if agreement is accompanied by possession of agreed line or is otherwise duly executed, and a boundary line between

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two tracts is indefinite, unascertained or disputed. 20 App. 737 (2) (93 S. E. 236).

Charge applying rules laid down in sections 3821 and 3822 not cause for new trial because court referred to time of acquiescence and actual possession as "a term of years as the law prescribes" and "a number of years," where in immediate connection therewith he also instructed in the language of such sections that acquiescence or actual possession must exist for seven years. 140/245 (2) (78 S. E. 905).

Charge that when one has been actually in possession of land for more than seven years under a claim of right, such claim shall be respected by the processioners, is not objectionable as not being applicable to processioning cases. 141/65 (2) (80 S. E. 288).

Duty of processioners in fixing and marking anew established lines is not to locate them as they originally ought to have been laid out, but only to fix and determine the boundaries as they actually exist. 21 App. 604 (1) (94 S. E. 824).

Evidence: Where, on trial of protest to return of processioners, the surveyor testified that he located the lines under a plat by a former surveyor and had paid no attention to who was in

possession and the protestant's evidence was that she and her tenant in common had been in possession under color of title for more than 24 years, verdict for the applicants was contrary to the evidence and this section. 141/113 (80 S. E. 290).

Land-lot line: Notwithstanding this section, where muniments of title of adjacent landowners call for line which is land-lot line between two lots, and such line as run by processioners passes in part through lands adversely held for seven years, entire proceeding is not void per se. 144/501 (2) (87 S. E. 656).

True line: Though course and extent of line itself may not have been actually marked out upon earth's surface, yet, if there should exist sufficient number of physically established corners or landmarks, mere connecting of which by straight lines, or from which the projecting of courses and distances shown by plat would suffice to complete boundary, it would be duty of processioners, in accordance with section 3820, so to ascertain, mark, and establish the same, respecting always the rights had under actual possession as defined by this section. 21 App. 604 (1) (94 S. E. 824).

§ 3823. (§ 3249.) Protest and appeal to superior court.

Amendment: Where adjoining landowner filed protest to lines run by processioners and jury found for defendant, and judgment was entered that lines in the protest were true lines, and on motion for new trial judge struck from decree the establishment of lines contended for, attempting to amend the decree without authority was harmless as against applicant for processioning. 142/115, 116 (6) (82 S. E. 520).

Charge: The issue formed by a protest is not of title but of boundary, and though charge on adverse possession for twenty years as giving prescriptive title may have been inapplicable, it was not injurious to losing party. 140/245 (3) (78 S. E. 905).

Section 3819 is inapplicable to the issue formed by a protest to the processioners' return, but the giving of such section in charge was not prej-

udicial to losing party, because in the trial of an issue formed by a protest the return of the processioners is to be deemed prima facie correct. Id. 245, 246 (4).

Where protest set up that part of line as run by processioners passed through land in possession of protestant more than seven years under claim of right, charge that if such was case, protestants must prevail as to that part of line, and that as to remainder verdict should be according to whether line run by processioners or that claimed by protestant was true line, was proper. 144/501 (3) (87 S. E. 656).

Evidence: On the issue formed by a protest to the return of processioners, burden is on applicant to make a prima facie case. 140/245 (1) (78 S. E. 905).

Processioning proceedings here not inadmissible on ground that it was not processioning of land of applicant

Of the nature of wills, by whom and how executed.

where return on its face purported to be processioning of such land, and face of proceedings did not show otherwise. 144/478 (1) (87 S. E. 465).

Processioning proceedings did not show on their face that they were inadmissible, because not accompanied by application for processioning, where they recited that it had been applied for and that processioners had acted. *Id.*

Processioning proceedings, where no trial was had, were merely prima facie evidence of correctness of lines surveyed and marked anew. *Id.* 478 (2).

Return of processioners and map of county surveyor were incompetent here to establish lines of small tract of land within larger tract. *Id.* 478 (3).

Evidence that former owner, under whom both parties claimed, had pointed out two corners to the processioners and the county surveyor, who had run straight line connecting these corners, did not show such running and re-

marking of lines as is contemplated by processioning law. *Id.* 478, 479 (3-a).

Where evidence as to location and boundaries was vague and uncertain, depending in great part on unlawful processioning proceedings, verdict for plaintiff should be set aside. *Id.* 478, 479 (4).

Refusal to exclude return of processioners on ground that protestant exhibited notice served on him in which processioners were described as being of certain district, while it appeared from return that they were of another district, was not error, no point being made as to their authority to act. 144/501 (1) (87 S. E. 656).

New lines: Where processioners and surveyors ignore claims of both sides to actual location of lines, and seek merely to discover an original line, verdict on protest of their return, sustaining it, should be set aside. 144/702 (87 S. E. 1054).

CHAPTER 2.

Of Title by Will.

ARTICLE 1.

Of the Nature of Wills, by Whom and How Executed.

§ 3828. (§ 3254.) **Form.**

Deed: Where instrument in form of and attested as deed contains clause that it is "to go into effect at the" signer's death, and where there is no other indication as to intention of signer, and the paper is duly delivered, it will be construed to be a deed postponing possession. 146/476 (1) (91 S. E. 551).

Criterion for determining whether instrument is deed or will is, whether it is to take effect immediately upon its execution and delivery, or after death of maker. 148/128 (1) (96 S. E. 3).

Where instrument was executed in form of fee simple warranty deed, but after description of land it was recited that grantor was "to have and control the sale of the land during her

natural life, thence" to the named grantee, such instrument is a deed vesting title immediately in the grantee, and is not testamentary in character. 148/128 (1) (96 S. E. 3).

Instrument here attested as a deed and delivered by maker at time of its execution to donee, who took actual possession of land referred to in instrument and held same to date of her death, was a deed, and court did not err in admitting it in evidence as part of chain of title. 148/137 (1) (96 S. E. 4).

Delivery: Where parties to instrument construed as a will intended delivery to await maker's death, and it was never delivered to devisee by reason of his death before maker, direction of

Of the nature of wills, by whom and how executed.

verdict for defendants in suit for land based on such instrument was proper. 147/438 (94 S. E. 544).

Intention of testator is controlling consideration in construing will, and his intention must be ascertained by taking the will, as it is said, "by the four corners," and giving to all parts of it consideration. 148/747 (1) (98 S. E. 348).

§ 3830. (§ 3256.) **Mutual wills.**

Death: On death of one of makers of joint instrument construed as separate will of each, instrument might be probated as his last will and testament while other maker was yet in life. 147/474 (3) (94 S. E. 572).

Reciprocal covenant: Paper signed by man and his wife and executed as a

§ 3832. (§ 3258.) **Power of testators.**

Burden in action of *devisavit vel non* is on propounder to show that testator had sufficient mental capacity to make will. 143/95 (1) (84 S. E. 436).

Charge: Submission of issue of testamentary capacity was error in view of ground of caveat, where all the evidence was to effect that testator's mind was sound. 143/95 (1) (84 S. E. 436).

Where probate of will was contested for incapacity of maker and for fraud and undue influence, charge, "Every person is entitled to make a will, unless laboring under some disability of the law. This disability arises either from the want of capacity or the want of perfect liberty of action," was not calculated to confuse and mislead jury because maker was shown to be crip-

Will: Instrument in which testator did "will" land and all deeds and other papers and his perishable property to his wife and appointing his wife executrix and requesting her to settle debts, and signed with attestation that it was signed, sealed, and delivered in presence of three persons named, was testamentary in character and sufficiently attested to be upheld as will. 141/607 (81 S. E. 856).

will, in which they devised their property to a nephew, with a charge for another's support, etc., was the separate will of the persons signing it as the makers, jointly executed without any reciprocal covenant. 147/474 (3) (94 S. E. 572).

ple and unable to walk without assistance. 148/277 (3) (96 S. E. 419).

Source from which property disposed of by will came into decedent's possession may be shown, as well as reasonableness of provisions of will, where probate is contested for incapacity of maker of will, or for fraud or undue influence. 148/277 (1-a) (96 S. E. 419).

Unreasonableness: Where probate of will is contested for incapacity of maker, or for fraud or undue influence, it is proper to inquire whether provisions are just and reasonable and accord with state of testator's family relations, or the contrary. 148/277 (1) (96 S. E. 419).

§ 3833. (§ 3259.) **May be good in part and bad in part.**

Nuncupative will: This section does not apply to nuncupative will which

has not been properly attested. 142/359 (82 S. E. 1054).

§ 3834. (§ 3260.) **Will should be voluntary.**

Burden is on propounder to show that testator acted freely and voluntarily. 143/95 (1) (84 S. E. 436).

Burden is on propounder, in making out *prima facie* case, not only to show factum of will, but that it was

freely and voluntarily executed as such. 144/731 (87 S. E. 1058).

Children: On an issue as to whether a will practically disinherited caveatrix, daughter of testator, ground of contest being that will was induced by

Of the nature of wills, by whom and how executed.

undue influence of testator's mother, testimony offered by propounder that testator expressed doubt as to mental capacity of caveatrix was admissible. 141/347 (3) (80 S. E. 1007).

Pleading: Petition here by heir at law of grantor praying cancellation of instruments because of mental incapacity, and fraud in their execution, did not set forth cause of action. 145/603 (1) (89 S. E. 700).

Undue influence: Where uncontradicted evidence shows factum of will and that testator apparently had sufficient mental capacity and acted freely and voluntarily, court in submitting issue of undue influence should charge that burden of proof is on caveator. 143/95 (2) (84 S. E. 436).

Giving of instruction that jury could find for caveators if from existence of "any of these facts" they determined that testator was unduly influenced, was error, where such facts considered separately were insufficient to show undue influence. Id. 95, 96 (3).

Facts that testator was an old man,

§ 3835. (§ 3261.) **Fraud vitiates.**

Evidence here held to sustain finding that will was procured through fraud of husband of testatrix to detriment

§ 3836. (§ 3262.) **Mistake vitiates pro tanto.**

Inferences: Allegations of caveat which merely alleged erroneous inferences drawn by testatrix from refusal to comply with her illegal request was demurrable under this section. 142/855, 856 (2) (83 S. E. 949).

Mistake of fact defined. 142/855, 860 (83 S. E. 949).

Where provision of will excluding one of testatrix's several heirs from participation in her estate was result of mistake as to conduct of heirs thus excluded, will is inoperative so far as

§ 3837. (§ 3263.) **Codicil.**

Certainty: Where provision in will is clear, certain, and definite in regard to bequest, codicil which is not certain and definite, its language being capable of some other reasonable construction, and which makes non-mandatory the terms of original bequest only as to

that he married second time, that he disinherited some of his children, and unequally distributed his estate among his children, that there were unfriendly feelings among members of the family and an estrangement between children and their stepmother, insufficient to show undue influence. Id. 95, 96 (3-a).

In view of evidence here charge on undue influence that it was immaterial "who might bring this mental condition on the maker of the will" was inaccurate. Id. 95, 96 (4).

Evidence that several years before executing will testator undertook to provide for two grandchildren and leave them plenty was relevant where it appeared that a mere nominal sum was provided for them in the will. Id. 95, 96 (5).

Evidence that testator had, by deed to tract of land, made provision for one of the caveators, to whom only a nominal sum of money was left by the will, was admissible though genuineness of deed was disputed. Id. 95, 97 (6).

of legatees under first will. 142/352 (3) (82 S. E. 1065).

such heirs are concerned, but entire will is not necessarily void. 148/339 (2) (96 S. E. 858).

Mistakes of fact as to conduct of heirs at law of testator which will render inoperative portions of will dis-inheriting such heir or heirs are not solely such mistakes of fact as are caused in mind of testator by false statements or misrepresentations made by beneficiary under will, but may be mistakes of fact arising otherwise. 148/339 (3) (96 S. E. 858).

specific form of fulfillment, and does not alter mandatory character of original bequest as to its general purpose, will not work revocation. 147/154 (1) (93 S. E. 84).

Provision in codicil, "that any person not named for bequest by being

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overlooked by me, and who the executors feel was an oversight, be provided for liberally and before provision is made for any charitable object," is

§ 3838. (§ 3264.) **Who may make a will.**

Cited. 148/277, 281 (96 S. E. 419).

§ 3840. (§ 3266.) **Insane persons.**

Burden is on propounder in making out prima facie case, not only to show factum of will, but that testator was apparently mentally capable of making it. 144/731 (87 S. E. 1058).

Charge that evidence that testatrix made certain statements could be considered in determining her state of mind, but not as evidence of existence of facts stated, was not prejudicial to caveators. 144/67, 68 (4) (86 S. E. 233).

Evidence: To make out prima facie case, propounder must introduce evidence of sanity, and not rely on legal presumption thereof. 144/67 (2) (86 S. E. 233).

Inquisition: Upon trial of issue involving soundness or unsoundness of will of testatrix at time of execution of will, verdict of jury upon inquisition of lunacy, finding that she was of sound

unenforceable, because too indefinite and too uncertain. 147/313 (93 S. E. 878).

mind some three years after execution of will, is admissible in evidence. 148/339 (1) (96 S. E. 858).

Insane delusion exists wherever a person conceives something extravagant to exist which has no existence whatever, and he is incapable of being permanently reasoned out of that conception. 142/855, 856 (2) (83 S. E. 949).

Mania is a form of insanity accompanied by more or less excitement, which sometimes amounts to fury. 142/855, 856 (2) (83 S. E. 949).

Monomania: Allegations of caveat to propounding of will here sufficiently averred monomania within this section. 142/855 (1) (83 S. E. 949).

Monomania means a mental disease, not merely the unreasonable conduct of a sane person; it is a species of insanity. Id. 855, 856.

§ 3841. (§ 3267.) **Eccentricity, imbecility, etc.**

Construction: This section and section 4863 are in *pari materia* and must be construed with reference to each other. 148/277, 281 (96 S. E. 419).

Evidence: There is no merit in complaint that rule of evidence prescribed by this section, when given in charge to jury, invaded province of jury. 148/277 (4-a) (96 S. E. 419).

This section, in so far as it prescribes a rule of evidence, constitutes exception to general rule in section 4863. 148/277, 281 (96 S. E. 419).

Reasons: Conversations between testator and one of the witnesses when the will was executed, in which testator

stated his reason for excluding a daughter, was admissible. 141/347 (3-a) (80 S. E. 1007).

Unreasonableness: Where testamentary capacity is in issue, evidence of reasonableness or unreasonableness of will is admissible. 144/67, 68 (3) (86 S. E. 233).

Evidence of value of decedent's estate and land bequeathed, part to husband with remainder over, was admissible. 144/77 (1) (86 S. E. 243).

Evidence of value of certain personalty not disposed of was admissible. Id.

§ 3842. (§ 3268.) **Amount of capacity necessary.**

Declarations: Where there was some evidence tending to sustain a caveat that testator did not have testamentary capacity and that the will was procured by undue influence it was error to admit evidence that the legatee al-

leged to have exerted influence had stated prior to her death that testator's mind was sound and that the will was made in accordance with his wishes. 141/347, 348 (5) (80 S. E. 1007).

Of the nature of wills, by whom and how executed.

Evidence here was sufficient to make out prima facie case of testamentary capacity. 144/63 (2) (86 S. E. 227).

Where judge explained distinction between capacity to make a will and capacity to make a contract by giving in charge this section, admission in evidence of will of defendant's decedent, over objection that it was irrelevant and was not admissible to show mental capacity to contract, if error, was harmless. 23 App. 181, 183 (9) (98 S. E. 94).

Intelligence: Standard of intelligence required to constitute mental capacity to make a will and amount of mental capacity required to make a contract are not the same, since "incapacity to contract may coexist with a capacity to make a will." 23 App. 181, 183 (9) (98 S. E. 94).

Parol evidence: Exclusion of witness' statement that "From what I saw, I think my wife was incapable of making an intelligent disposition of her property," if error, was harmless. 144/77 (3) (86 S. E. 243).

§ 3846. (§ 3272.) Formalities of execution.

Attesting clause: Complete attestation clause, properly signed, is prima facie evidence of due execution of will, and shifts burden of proof to those denying such execution. 144/801 (4) (87 S. E. 1046).

Burden of proof of due execution is on proponent. 140/119 (1) (78 S. E. 823).

Presence: If the situation and circumstances of the testator and attesting witnesses are such that testator may have seen the act of attestation the requirement of the law is sufficiently met. 141/347, 348 (8) (80 S. E. 1007).

If testator could not have seen attesting witnesses sign, on account of an obstruction to the view, and, by reason of his enfeebled condition, he could not have placed himself in position to see them sign, the attestation was not good. Id. 348 (8-a).

Evidence here authorized instruction that jury should find against will, if

testator did not acknowledge signature in presence of witnesses, even though he signed will. 144/801 (1) (87 S. E. 1046).

Evidence authorized instruction to find in favor of will, if testator's name was signed when he procured witnesses to sign and he then acknowledged his signature in their presence. Id. 801 (2).

Acknowledgment by testator of signature in presence of witnesses is sufficient. Id. 801 (3).

Witnesses to propounded will testifying that they can not remember whether testator signed will in their presence, such signing may be shown by other competent testimony. 140/590 (2) (79 S. E. 473).

Signature: Admission of evidence to show genuineness of testator's signature to will was not error here. 144/801 (5) (87 S. E. 1046).

§ 3847. (3273.) Attestation by illiterate persons.

Witnesses: Due execution of will being made to appear by attesting witnesses, fact that will was written upon several pages of tablet, and that witnesses did

not see pages other than that upon which testatrix wrote her signature, not ground for refusing probate. 145/287, 288 (4) (88 S. E. 964).

§ 3850. (§ 3276.) Knowledge of contents.

Cited. 144/801, 819 (87 S. E. 1046).

§ 3851. (§ 3277.) Charitable devises.

Construction: This section is a limitation on the testamentary power, and is to be strictly construed in favor of those persons named in the statute, and none other; son and daughter hav-

ing failed or refused to claim prohibition of statute, collateral kin can not invoke it. 147/633, 634 (2) (95 S. E. 210).

Educational institution, as used in this

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section, includes the University of Georgia. 141/390, 391 (1-b) (81 S. E. 238).

Where testator made certain specific legacies and then devised all the residue to his wife and son, share and share alike, the wife's share being for life or widowhood only, and the son's share being for life, then, failing issue, to surviving wife, a devise of the entire remainder to an educational institution was invalid. Id. 391 (3-b).

Estoppel: A widow accepting a certain sum bequeathed to her in lieu of dower and year's support is not estopped from attacking the validity of a devise to an educational institution

of more than one-third of the estate. 141/390, 391 (3) (81 S. E. 238).

That testator's wife, who was also the life tenant, received the income arising from the estate did not estop her from attacking a devise of the remainder to such educational institution. Id. 391 (3-a).

Private wrong: This section prohibits exclusion by testator of persons mentioned, which prohibition is not made in the public interest, but only to prevent what the statute regards as a private wrong. 147/633, 634 (1) (95 S. E. 210).

Scope: This section does not prohibit devise for charitable uses. 147/633, 634 (1) (95 S. E. 210).

ARTICLE 2.

Of Probate and Its Effect.

§ 3853. (§ 3279.) Jurisdiction of ordinary.

Superior court: Probate proceedings pending on appeal in superior court can not be disposed of by separate suit to

declare will void and for merger of pending probate proceedings. 145/603, 604 (2) (89 S. E. 700).

§ 3855. (§ 3281.) In common form.

Stated. 140/707, 709 (79 S. E. 855).

§ 3856. (§ 3282.) In solemn form.

Burden of proof on propounders to show due execution and testamentary capacity. 140/119 (1) (78 S. E. 823).

Burden of proof is on propounder to show the factum of the will. 143/95 (1) (84 S. E. 436).

Burden of proof in action of devisavit vel non is on propounder to show that testator had sufficient mental capacity to make will. Id.

Burden of proof is on propounder to show that testator acted freely and voluntarily. Id.

Burden of proof is on propounder not only to show factum of will but that testator was apparently mentally capable of making it, and that it was freely and voluntarily executed. 144/731 (87 S. E. 1058).

Upon trial of issue arising upon propounding of will and caveat thereto, burden, in first instance, is upon propounder to make out prima facie case,

by showing factum of will, and that at time of execution testator apparently had sufficient mental capacity to make it, and, in making it, acted freely and voluntarily; when this is done, burden of proof shifts to caveator. 148/339, 340 (5) (96 S. E. 858).

Caveat: Amendments to caveat in proceedings to probate second will here were not objectionable. 142/352 (4) (82 S. E. 1065).

In proceeding to probate will in solemn form, motion to dismiss caveat on ground that it appeared to be merely a caveat to proceedings to probate in common form, or a petition to require propounder to probate in solemn form, was without merit. 147/699 (1) (95 S. E. 236).

Caveat to probate of will in solemn form here sufficiently set forth contentions of caveators that will was executed when testator was without

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testamentary capacity, through fraud of propounder and legatees and under mistake of fact as to conduct of his children. 147/699 (2) (95 S. E. 236).

Charge using expressions "executed" and "signed" was not erroneous here in view of testimony of propounder, especially where no request was made for more explicit instructions. 142/352 (2) (82 S. E. 1065).

Where particular ground of caveat charges certain conduct upon part of propounder, beneficiary under the will, it was not error for court to charge, in dealing with that ground of the caveat, that jury should find against that particular ground unless it should be established by the evidence. 148/339 (4) (96 S. E. 858).

Construction of will not before court for determination. 140/119 (6) (78 S. E. 823).

Counsel fees: Executor under will probated in common form, called upon to probate it in solemn form, entitled to reasonable counsel fees out of estate, notwithstanding will may be refused probate. 140/707 (1) (79 S. E. 855).

If executor in bad faith and in fraud of rights of heirs attempts to probate pretended will, not entitled to reimbursement from estate for expense incurred. *Id.* 707 (2).

Good faith of counsel of executor is immaterial. *Id.* 707 (3).

Devisavit vel non only issue. 140/119 (6) (78 S. E. 823).

A court of ordinary in probating wills merely adjudicates the factum of the will and not validity of a devise contained in any item of the will. 141/390, 391 (2) (81 S. E. 238).

Directed verdict: Prima facie case for probate of paper having been made out, direction of verdict for contestant, who introduced no evidence, error. 140/119 (7) (78 S. E. 823).

Evidence: That alleged testator knew contents of instrument and desired to execute it as will, may be considered on issue of *devisavit vel non*. 140/119 (5) (78 S. E. 823).

Admission of will in evidence over objection that it was not shown that paper about which attesting witness testified was that produced in court was not error here. 144/63 (1) (86 S. E. 227).

Probate of will in solemn form is conclusive of its validity, and it is irrelevant to inquire into testamentary capacity of testator or any undue influence alleged to have been exerted by devisee. 145/682, 683 (7) (89 S. E. 749).

Stenographer's transcript of testator's testimony given in suit to which he was party several years before was admissible in evidence in proceeding to probate will in solemn form with caveat, if material and relevant. 147/699, 700 (3) (95 S. E. 236).

Where will did not purport to devise any specified land, but contained a general residuary clause, and it appeared from evidence that testator had gone into possession of certain plantation, and had remained in possession by consent of other heirs at law, without intention to lay claim to whole of estate, it was not error to exclude affirmative answer of witness, who was being examined by caveators, to question whether land, referred to as a whole, was the property disposed of by the will. 148/512 (1) (97 S. E. 440).

See **Burden of Proof, Handwriting, Presumption, Witnesses.**

Expenses: If executor in bad faith and in fraud of rights of heirs attempts to probate pretended will, not entitled to reimbursement for expenses incurred. 140/707 (2) (79 S. E. 855).

Fraud: Fact that if decedent had left no will her husband would have been her sole heir did not preclude court from refusing probate of second will procured by him through fraud to detriment of legatees under first will. 142/352 (1) (82 S. E. 1065).

Fact that execution of second will was procured by fraud of the principal beneficiary to the injury of the legatee under the first will was ground for refusal to probate the second will. *Id.*

Handwriting of witnesses who can not be produced may be proven to show due execution. 140/119 (2) (78 S. E. 823).

Judgment: Motion here to set aside judgment of court of ordinary probating will in solemn form for failure to take testimony of subscribing witness was insufficient. 143/598 (3) (85 S. E. 758).

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Jury: Where jury find that testator had testamentary capacity, will can not be set aside or probate refused because jury think it unreasonable. 144/67, 68 (3) (86 S. E. 233).

Mistaken recital in will relative to property previously given to testatrix's relatives did not as matter of law invalidate will as to such heirs. Id. 67, 68 (5).

Nuncupative will: Judgment of court of ordinary probating nuncupative will is binding upon heirs who are named as such in application for probate, and upon whom service is duly made, until it is set aside in proceedings duly instituted for that purpose. 146/746 (1) (92 S. E. 44).

Where in application for probate in solemn form of nuncupative will certain persons were named as heirs and service upon them was prayed, and in judgment upon this application service

upon all heirs of named decedent was recited, and will was set up and declared to be will of that decedent, all of those who were so named as heirs are bound by the judgment, and can not collaterally attack the will. 146/746 (2) (82 S. E. 44).

Presumption of due execution arises from recital of essential facts in attestation clause, and showing testator and witnesses signed instrument. 140/119 (4) (78 S. E. 823).

Void devise: Fact that limitation on particular devise is void under section 3684, not ground for refusing probate of will properly executed by person having testamentary capacity. 144/198 (86 S. E. 555).

Witnesses: Execution proved by such witnesses as can be produced or are competent. 140/119 (2) (78 S. E. 823).

§ 3857. (§ 3283.) Limitation of seven years.

Stated. 140/707, 709 (79 S. E. 855).

Heirs: Where propounder, grandson of testatrix, claimed as legatee under will executed after one which had been probated in common form, his father was the sole heir and he was not an heir within this section. 142/405 (2) (83 S. E. 121).

Parties: Exception in this section declaring probate in common form conclusive after seven years on all except minor heirs does not extend to other parties. 142/405 (1) (83 S. E. 121).

§ 3861. (§ 3287.) Examination by commission.

Applied. 143/598 (1) (85 S. E. 758).

Evidence: Depositions of witnesses living beyond court's jurisdiction not necessary where will can be proved

by other legal evidence. 140/119 (3) (78 S. E. 823).

Permissive: Provisions of section are merely permissive. 140/119, 123 (78 S. E. 823).

§ 3862. (§ 3288.) Will must be filed.

Stated. 140/707, 709 (79 S. E. 855).

§ 3863. (§ 3289.) Copy of a will, when established.

Burden of proof: Charge here as to burden of proof upon propounder was harmful to caveator. 147/571, 572 (7) (94 S. E. 1021).

Evidence: Presumption as to revocation of will by testator may be rebutted by proof that will was lost or destroyed subsequently to death of testator, or prior to his death without his consent, or that he had lost his testamentary capacity before his death and will was

in existence at time the mental alienation occurred, and the like; whether presumption has been overcome is question for the jury. 147/571, 572 (3) (94 S. E. 1021).

In order to rebut such presumption facts must be sufficient to do so, and be clearly proved. Id. 571, 572 (4).

Parties: Where person claiming as tenant in remainder institutes action to establish and probate in solemn form

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copy of alleged lost original will after death of life tenant, who is alleged to have been widow and sole heir at law of testator and devisee of all of his estate for life, and administrator upon estate of life tenant is made party defendant and is personally served with copy of petition and citation issued by ordinary, petition is not subject to dismissal, on motion by administrator, on ground that citation has not been published, or that heirs at law are not made parties defendant. 147/571 (2) (94 S. E. 1021).

Petition: It is immaterial whether original will was lost subsequently to death

or destroyed without consent of testator during his life; petition which does not allege whether will was lost after death of testator, or that it was destroyed during his life without his consent, and does not allege any facts showing manner of loss or destruction, is subject to demurrer. 147/571 (1) (94 S. E. 1021).

Verdict: Where objector to probate of alleged lost or destroyed will sets up alleged prior original will, court should so frame forms of verdict as to submit to jury question of setting up such prior will for probate. 147/571, 572 (8) (94 S. E. 1021).

§ 3866. (§ 3292.) **Who offers will for probate.**

Interest: Under allegations of petition in intervention here in probate proceedings, intervenor was stranger to will,

and no such interest was shown by him as entitled him to intervene. 148/195 (96 S. E. 177).

§ 3868. (§ 3294.) **When it must be offered.**

Duty of executor to offer will for probate and have the issue tried of *devisavit vel non*; if there is any reason

why executor can not act, he ought so to declare. 141/390, 401 (81 S. E. 238).

§ 3870. (§ 3296.) **Admission of executor, etc.**

Forgery: Evidence that two of the legatees under a will offered for probate had made admissions tending to

show that will was forgery was admissible. 142/420 (4) (83 S. E. 118).

ARTICLE 3.

Probate of Foreign Wills.

§ 3874. (§ 3300.) **Evidence.**

Evidence: Where, on application to require executor to prove in solemn form will probated in common form in another state, it appeared that exempli-

fication of such probate proceedings had been filed in Georgia, validity of probate was not pertinent issue. 144/707 (4) (87 S. E. 1025).

§ 3877. (§ 3303.) **Probate of foreign will bequeathing personalty.**

Remaindermen: Where devise was to A for life, with remainder to children of A, and executor in other State sold personalty in the other State, and from proceeds advanced money to A and her husband, taking from them mortgage on other separate property of A in the estate, conditioned upon repayment to the executor of amounts so advanced when A should die, and after having thus procured money A invested it in lands in this State, to which she took

absolute fee simple deed, title to such lands was A's absolutely, unaffected by any right of remaindermen. 146/464 (1-a) (91 S. E. 476).

Situs: Where property was bequeathed by will to one in another State, and will according to laws of that State was sufficient to make valid devise of personalty, title of devisee thus obtained will be recognized in this State after personalty has been brought into this State. 146/464 (1) (91 S. E. 476).

Of the executor.

ARTICLE 4.

Of the Executor.

§ 3883. (§ 3307.) **Executor's power before probate.**

Impounding land: Pending determination of issue of *devisavit vel non*, judgment creditors could not have land impounded in receiver's hands to col-

lect rents to be applied to life tenant's debt in event will was probated, even though he was insolvent. 143/336 (85 S. E. 107).

§ 3885. (§ 3309.) **Administrator, etc.**

Next of kin: Court did not err in sustaining motion to strike caveat to petition for appointment as administrator with will annexed, where it was not

alleged in caveat that petitioner was not next of kin nor beneficially interested in estate. 20 App. 302 (93 S. E. 33).

§ 3886. (§ 3310.) **Executor de son tort.**

Cited. 14 App. 225, 227 (80 S. E. 523).

Stated. 232 Fed. 921, 922 (10).

Administrator: Where one who has wrongfully converted personalty of unrepresented estate is appointed and qualifies as administrator, he can not be held liable as executor in his own wrong, for prior conduct, but becomes liable for proper administration of estate as administrator. 144/687 (2) (87 S. E. 891).

Attorney's fees: Where suit is brought against executors *de son tort* for attorney's fees included in a note given by decedent, judge, sitting as both court and jury, did not err in refusing to render judgment against defendants for such fees, for payment of which estate had never become legally liable. 23 App. 244 (4) (97 S. E. 889).

Heirs: Where heirs of decedent whose estate has no legal representative take upon themselves exercise of a legal representative's duties, they become liable to creditor of estate, as executors in their own wrong, for double value of property of estate possessed or converted by them, up to amount of creditor's claim. 23 App. 244 (2) (97 S. E. 889).

Statute of limitations: Suit for account-

ing of personalty instituted more than ten years after right of action accrued was barred. 145/771 (1) (89 S. E. 830).

Suit: Nature of suit is limited to personal action against executor *de son tort*, and can not be treated as being directed against estate itself; while in such a suit by a creditor claim against decedent affords to plaintiff his legal status, suit is merely for double the value of the property illegally possessed or converted and can not properly be brought upon original obligation itself. 23 App. 244 (3) (97 S. E. 889).

Refusal to permit plaintiff to convert action against alleged wrongful executors for double the value of personal property illegally possessed and converted, to extent of plaintiff's claim under note given by decedent, into one against estate itself by making subsequently legally appointed administrator a party defendant, was not error. 23 App. 244 (4) (97 S. E. 889).

Time of conversion: Double liability imposed by this section is in nature of penalty for conversion after death of owner, and does not apply where conversion is during his lifetime. 144/687 (1) (87 S. E. 891).

§ 3889. (§ 3313.) **Interest of executor.**

Life estate: Where remainder estate failed because of lack of takers, on life tenant's death grantor or his heirs were entitled to right of entry, and executor of grantor was entitled to

recover land of widow of deceased life tenant. 147/12 (3) (92 S. E. 540).

Where will created life estate in widow of testator, with remainder to his children, and widow, who was

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named as executrix, sold property of estate at private sale without order authorizing sale, her deed conveyed

only the life estate, and did not divest the children of their interest in the remainder. 148/44 (2) (95 S. E. 682).

§ 3890. (§ 3314.) **Compensatory bequests to executors.**

Premium on bond: Where will provided that executor should administer entire estate even to distribution after termination of life estate, and that he be excused from giving bond, and finding that prior death of executor was not contemplated by testator was author-

ized, premium of bond of administrator *de bonis non cum testamento annexo* should not be charged against executor's distributive share of the estate but against the estate itself. 148/208 (96 S. E. 175).

§ 3892. (§ 3316.) **Powers, duties, and liabilities.**

Borrow money: In absence of any authority conferred by will, an executor has no power, by virtue of his appointment as such, to borrow money and bind the estate by a note, though the money be borrowed for the benefit of the estate. 141/379 (1, 2) (81 S. E. 197); 142/118 (1) (82 S. E. 519).

If legatees agreed that the executors might renew a certain note of the testator, barred during his lifetime, and the executors gave a note in renewal, they had no further authority to borrow money to pay such renewal note. *Id.* 379 (3).

Petition in action by one who had loaned money to executors to pay note renewing one executed by decedent, praying that the land be sold to pay the judgment, and alleging that the money was loaned at the request of legatees, did not state a cause of action, where there was no allegation that the debts had been paid or the estate was insolvent, or setting forth how such agreement could bind any creditors. *Id.* 379 (4).

Compensation: In equitable suit by legatees against executors, for accounting, it is competent for executors to be decreed allowance for commissions to which they would be entitled under section 4062, and also to reasonable compensation to which they might be entitled under section 4065, notwithstanding no application has been allowed therefor in court of ordinary. 146/525 (4) (91 S. E. 780).

Contracts: General rule is that executor can not bind estate by his contracts, except such as are authorized by law or terms of will, and if he makes con-

tracts not authorized, he is individually liable. 148/176 (96 S. E. 214).

Where testator appointed his wife executrix, and "suggested," but did not direct, that in management of business she should seek advice of good lawyer and of practical businessman, she was not authorized to employ a practical businessman to manage affairs of estate and to pay him therefor out of its assets; where she did so, she was individually liable for debt incurred. 148/176 (96 S. E. 214).

Deed: Executor's deed is inadmissible in evidence without proof of grantor's appointment as executor. 143/70 (1) (84 S. E. 120).

Party: Where rule is issued against executrix of deceased defendant, and she objects to being made party on ground that rule should not have issued until after lapse of twelve months from probate of testator's will, and though admitting that she received copy of rule by mail, she protests that she was not properly served, and hearing occurs more than twelve months after probating will, judgment making her a party will not be vacated on these grounds, under circumstances of case. 146/442 (1) (91 S. E. 483).

Sale: Court of ordinary may order sale of devised real estate for purpose of paying debts, provided it be necessary to sell same for such purpose. 149/693, 696 (101 S. E. 807).

Under will directing executrix to pay debts without delay, and to make equal division between devisees, duty of selling for distribution, if lands could not be divided in kind, devolved upon executrix. 149/693, 696 (101 S. E. 807).

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Subrogation: Where administrator borrowed money illegally and used the same to pay debts, the lender is not

subrogated to the rights of creditors whose debts have not been paid. 142/118 (2) (82 S. E. 519).

§ 3893. (§ 3317.) **When more than one executor.**

Suit: One of two executors can not maintain suit in individual capacity

against other as executor. 17 App. 59 (2) (86 S. E. 272).

ARTICLE 5.

Of Devises and Legacies.

§ 3895. (§ 3319.) **Assets to pay debts.**

Stated. 149/725 (1) (101 S. E. 793).
Cited. 17 App. 59, 63 (86 S. E. 272).

Definition: While word "legatee" generally refers to beneficiary of personal property under will, in ordinary usage

it and the word "devisee" are frequently used as synonymous or interchangeable. 148/539, 541 (97 S. E. 534).

§ 3896. (§ 3320.) **Effect of assent.**

Stated. 140/554, 566 (79 S. E. 546);
149/725 (1) (101 S. E. 793).

Life estate: Where executrix, who was also life tenant in property devised, executed deed both in her representative and individual capacity, transferable interest in the life-tenant was recognized, and there was such assent to legacy by executrix as authorized life-tenant to convey her life-estate. 142/366 (3) (82 S. E. 1071).

fully refuses to assent. 147/399 (94 S. E. 227).

Petition: Under petition here construed as one by legatee for recovery of property devised, construction of will may be invoked as basis for such recovery, but petition must allege that administrator has assented to devise, or wrong-

Possession: While executor's assent to legacy will be implied if will allows legatee to remain in possession of property, such assent will not be implied because executor and legatee, who are mother and son, occupied same house and had control of personality. 144/69, 70 (7) (86 S. E. 236).

Where executors caused will to be probated, assented to legacy, and permitted life tenant to take possession of land devised, such assent inured to the benefit of the remaindermen and perfected their title. 148/77 (1) (95 S. E. 965).

§ 3900. (§ 3324.) **Intention of testator.**

Stated. 140/297, 300 (78 S. E. 1086).

Certainty: Where testator empowers executors to provide for any other charitable object which may appeal to them, and also to delay time for carrying out this provision as adopted or amended by them, such provision is unenforceable, because too uncertain and indefinite both as to object in view and as to time for performance, and because authority for indefinite delay is equivalent to authority for nonperformance. 147/154 (2) (93 S. E. 84).

Provision in codicil, "that any person not named for bequest by being

overlooked by me, and who the executors feel was an oversight, be provided for liberally and before provision is made for any charitable object," is unenforceable, because too indefinite and too uncertain. 147/313 (93 S. E. 878).

Children: Under will providing that at expiration of trust all property may be divided in kind or may be sold, and proceeds divided between "my children and grandchildren, two shares to each child and one to each grandchild. If the grandchild is dead, leaving children, such child or children shall in-

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herit the parent's share," one of the distributees took life interest contingent upon their leaving children. 148/747, 748 (2) (98 S. E. 348).

Will here construed, and held that all three daughters of testator having survived both the maker and the life tenant, each was entitled to her respective share in the land devised by the will, in fee simple; and children of one of them (the other two having died without issue) did not acquire any interest whatever in the land it so devised. 149/106, 107 (1) (99 S. E. 298).

Clause: Last clause of section is to be construed as limitation upon power of court to transpose sentences, change connecting conjunctions, or supply omitted words, if clause as it stands in relation to whole instrument is intelligible and operative. 148/747, 748 (1-c) (98 S. E. 348).

Codicil: Where provision in will is clear, certain, and definite in regard to bequest, codicil which is not certain and definite, its language being capable of some other reasonable construction, and which makes non-mandatory the terms of original bequest only as to specific form of fulfillment, and does not alter mandatory character of original bequest as to its general purpose, will not work revocation. 147/154 (1) (93 S. E. 84).

Bequest here of one-third of the residue of estate to a nephew, his heirs and assigns, was revoked by a codicil which was executed after the death of such nephew, giving a stated sum to such nephew's heirs, codicil reciting that "this shall be their full share of my estate." 149/266 (100 S. E. 1).

Construction of will may be invoked by devisee or legatee, as basis for recovery of devised or bequeathed property. 147/399 (94 S. E. 227); 149/725 (2) (101 S. E. 793).

Judgment overruling general demurrer to petition, not having been excepted to or set aside, was conclusive against demurrant, and as to her it settled law of case, involving construction of will in question. 149/758 (1) (102 S. E. 148).

Judgment overruling general demurrer filed by widow of testator to petition in suit against widow and executor of estate, which was not ex-

cepted to or set aside, settled law of the case, as to executor, involving construction of will in question. 149/758, 759 (102 S. E. 148).

Description of property here was too uncertain to vest title to land in named devisee. 142/278 (82 S. E. 626).

Where testator devised all of his estate to his wife for life and over to niece for life and over to her children or their representatives, and died seized of a certain city lot in a named city of certain county, and of certain numbered lots in a stated district of the same county, deed by daughter of niece of her interest under the will in testator's land in the named county, including such lots, held not void for uncertainty of description, when considered with the will and extrinsic evidence. 148/839 (1) (98 S. E. 490).

Distribution: Where testator bequeathed to his wife and two sons all his property, share and share alike, and directed that it be kept together and not sold for twenty years after his death, and it was left entirely discretionary with widow what annual allowance she should make to the son, a son who had become of age and who had married and moved away from the estate, could enforce demand for payment to him of portion of net income from estate, in equitable suit seeking accounting and ascertaining of amount due him. 149/725 (3) (101 S. E. 793).

Entire will: Effect is to be given to intention of testator as gathered from entire will. 147/800 (95 S. E. 681).

In construing particular item of will, or particular clause of item, court will view and consider whole instrument. 148/747 (1-a) (98 S. E. 348).

This section does not affect nor is it limitation upon application of general rule that intention of testator is controlling consideration in construing his will, and that intention must be ascertained by giving to all parts of will consideration. 148/747, 748 (1-b) (98 S. E. 348).

Equal interest: Provision in item of will giving one grandchild certain sum of money "in addition to the equal portion of the estate" did not show testamentary scheme that special de-

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vise to another grandchild, mentioned in another item, should not be additional to devise to such grandchild of equal portion of estate, authorizing equal division among testator's children and grandchildren. 144/543 (87 S. E. 665).

When testator provided for distribution of his estate among his children and grandchildren, second item of will, giving land to one granddaughter, not in conflict. Id.

Heir: Where children of testamentary trustee took vested interest in property devised, which interest consisted of equitable title during his life, becoming fee simple estate upon his decease, heirs of trustee's children would inherit interest of such children who predeceased trustee and died intestate. 146/784 (92 S. E. 531).

Will here construed, and held that upon death of named son of testator, prior to 25th anniversary of birth of daughter of testator, corpus of property and subsequent income therefrom passed to surviving brother and sister, and did not descend as an inheritance to the heirs of the deceased son. 147/114 (92 S. E. 887).

Legacy: Will here construed and held that grandniece and grandnephew were not limited to special legacies mentioned, but each was entitled to share in residuary bequests. 148/613 (97 S. E. 674).

Item in will, "I owe one thousand pounds sterling to the estate of my sister A., now represented by her son H. These amounts were borrowed by me on condition that I return them when I no longer needed them. Interest was not mentioned either by them or by me. On thousand pounds to each will be satisfactory. This money business to be conducted with my nephew H., and with no one else," was properly construed as creating a legacy, and not as a provision for the recognition and payment of a debt. 149/340 (2) (100 S. E. 106).

Legatees: Son of one for whom testator made provisions during his life held here to be a legatee under the will. 147/348 (1) (94 S. E. 228).

All property rights to which such legatee was entitled under the will were

divested by his death without leaving child or children. Id. 348 (2).

Longevity pay: Where testator bequeathed all of his property to his wife, claim for "longevity pay" due to testator for services rendered as cadet of military academy of United States and as officer in United States Army collected by administrator *de bonis non cum testamento annexo* was property of which testator was seized and possessed, and passed to his widow. 147/127 (1) (92 S. E. 937).

Name: Item of will is not necessarily void because it does not contain name of beneficiary to whom it was intention of testator legacy should be given, and court properly directed administrator to make investigations in order to ascertain and make certain name of person intended. 145/856, 857 (2) (89 S. E. 1084).

Per stirpes and per capita: "Heirs," in devise to testator's wife for life, then to heirs of his deceased brothers, share and share alike, is equivalent to children, who take per capita and not per stirpes. 145/234 (88 S. E. 963).

Under devise in trust here for son for life and on his death without children remainders over to other children and representatives of children of testator, each of three sets of representatives of deceased children who were in life at death of life tenant took per stirpes a vested estate in remainder of the property, each set taking one-third thereof. 147/102 (1) (92 S. E. 870).

Will construed and held that intention of testator was that after death of his wife income from money bequeathed should be paid one-half to one daughter and her children, and the other half to his other daughter and her children, children of each mother to share equally with her, and at death of mothers each one's share was to go to their respective children. 146/42 (90 S. E. 471).

Under will directing that remainder of estate be equally divided per capita among nephews and nieces, daughter of niece to take full per capita share in her mother's stead, share of such daughter, dying before testator, did not lapse, and her heirs took her devise. 147/800 (95 S. E. 681).

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“Perishable property,” as used in will declaring that two named sons of decedent should share equally with the rest of the children in all of the perishable property, were intended by testator to include personal property of every description of which he died possessed. 146/138 (1) (90 S. E. 852).

Petition here held to seek to recover undivided one-third interest in land, on ground that under terms of will such interest had vested in named person, and, subject to certain incumbrances placed thereon by him, was so vested at the time such person was adjudicated a bankrupt, and by operation of law the title so held by such person devolved upon plaintiff, and that petition did not seek to recover income that executor might be required to pay such

person under provisions of will. 149/471 (1) (100 S. E. 566).

Premium on bond: Where will provided that executor should administer entire estate even to distribution after termination of life estate, and that he be excused from giving bond, and finding that prior death of executor was not contemplated by testator was authorized, premium of bond of administrator *de bonis non cum testamento annexo* should not be charged against executor's distributive share of the estate but against the estate itself. 148/208 (96 S. E. 175).

Uncertainty: Provisions of will here held not so indefinite as to be void and unenforceable. 145/856, 857 (1) (89 S. E. 1084).

§ 3901. (§ 3325.) Parol evidence on ambiguities.

Declarations of testator that he intended to dispose of his property in a certain way and to certain persons, different from that expressed in will, inadmis-

sible, where terms of will are plain and unambiguous. 140/691 (4) (79 S. E. 772).

§ 3902. (§ 3326.) General and specific legacies.

Bank deposit: Legacy of definite amounts deposited in named banks was specific legacy. 145/140 (1) (88 S. E. 670).

Evidence: Where will did not purport to devise any specified land, but contained a general residuary clause, and it appeared from evidence that testator had gone into possession of certain

plantation, and had remained in possession by consent of other heirs at law, without intention to lay claim to whole of estate, it was not error to exclude affirmative answer of witness, who was being examined by caveators, to question whether land, referred to as a whole, was the property disposed of by the will. 148/512 (1) (97 S. E. 440).

§ 3903. (§ 3327.) Income goes with corpus.

Devise: As general rule, specific devise of lands carries with it to devisees the income, profits, or increase of the

specific legacy from date of testator's death. 146/782 (1) (92 S. E. 533).

§ 3906. (§ 3330.) Lapsed legacies.

Conditional legacy: Where testator devised to another a certain sum of money, “provided he is in my employment at the time of my death,”

and such other voluntarily severed business relations with testator, and died before death of testator, the legacy lapsed. 145/479 (89 S. E. 521).

§ 3907. (§ 3331.) What falls to residuum, and what to heir.

Contingent legacy: Devise which was obviously and necessarily contingent when will was made is not, upon failure of contingency, within ordinary rule applicable to void or lapsed de-

vise; and residuary devisee will take instead of heir at law, unless will contains special indication of contrary intention of part of testator. 149/741 (102 S. E. 51).

Of revocation.

Petition in action by residuary legatees to recover interest in land was subject to general demurrer, where it did

not allege that there was residuary estate, etc. 144/460 (1) (87 S. E. 403).

§ 3910. (§ 3334.) **Election.**

Deed: Where widow did not know of existence of deed giving her absolute estate, fact that she may have taken under will would not amount to elec-

tion to forego her rights under the deed and estop her from claiming adversely to the will. 148/287, 289 (4) (96 S. E. 564).

§ 3914. (§ 3338.) **Bequest to charity.**

Cited. 147/633, 634 (1) (95 S. E. 210).

Certainty: Devise of estate "to be invested in safe securities, and the income arising therefrom to be used for the purpose of educating poor, worthy girls of good family and legitimate," is not void for alleged reason that designation of girls to be benefitted is so indefinite and uncertain as to render their identity impossible, and that the kind, amount, and quality of education to be bestowed is not ascertainable. 149/361 (100 S. E. 103).

Diversion of income: Improper diversion of income from trust funds affords no reason why trust should be declared void. 145/888 (90 S. E. 54).

Schools: Fact that there is system of public schools did not avoid trust under will devising property in trust for establishment of free school 145/888 (90 S. E. 54).

Trustee: Court can, upon proper application, appoint trustee to carry out provisions of will. 145/856, 857 (1) (89 S. E. 1084).

ARTICLE 6.

Of Revocation.

§ 3917. (§ 3341.) **Express or resulting.**

Codicil: Where provision in will is clear, certain, and definite in regard to bequest, codicil which is not certain and definite, its language being capable of some other reasonable construction, and which makes non-mandatory the terms of original bequest only as to specific form of fulfillment, and does not alter mandatory character of original bequest as to its general purpose, will not work revocation. 147/154 (1) (93 S. E. 84).

Partial intestacy: Where devise to two of testator's nephews was revoked as to one, an intestacy pro tanto was

created. 142/779, 780 (2) (83 S. E. 788).

Where testator devised and bequeathed property to his daughter, directing that if she died unmarried it should be divided between two nephews, and if she should marry and die without issue she might bequeath one-half the property to her husband, remainder to be divided among nephews, intestacy as to one-fourth of the property resulted where testator revoked the devise to one of the nephews, and the daughter married, and died without issue. 145/430 (3) (89 S. E. 418).

§ 3922. (§ 3346.) **Inconsistent provisions.**

Stated. 140/297, 300 (78 S. E. 1086).

§ 3923. (§ 3347.) **Revocation by marriage, etc.**

Birth: Where explicit language of will discloses general testamentary scheme to provide for children of testator as

a class, and there is nothing to indicate that such provision was intended to be limited to children in life, law

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will presume that testator understood legal meaning of language employed, and intended natural consequences of his act, and therefore that will was

made in contemplation of such event as subsequent birth of child to him. 147/561 (94 S. E. 995).

ARTICLE 7.

Of Nuncupative Wills.

§ 3925. (§ 3349.) **Nuncupative wills, when good.**

Charge here on test of validity of nuncupative will was not erroneous. 142/5, 6 (2) (82 S. E. 246).

Proof: Where one witness to nuncupative will testified that he did not hear testator make any statement as to one-half of his estate, but other two witnesses testified that decedent made certain disposition of entire estate, verdict refusing probate of will was properly directed. 142/359 (82 S. E. 1054).

Where estate was declared in paper propounded as nuncupative will to consist of both land and personal property, and two of the witnesses described a contemplated bequest as "land," and third witness, referring to same be-

quest, employed the broader term, "property," there was a material variance, and there was failure on part of all the witnesses to testify in substantial accord with language of paper propounded as will, and verdict setting up paper as the will was unauthorized by the evidence. 148/22 (95 S. E. 691).

Written will: This section does not contemplate that person who has been sick for long time can not, on her illness reaching critical turn, make nuncupative will, merely because prior thereto, if her attention had been called to making of will, she would have had opportunity to reduce it to writing. 142/5, 6 (2) (82 S. E. 246).

§ 3926. (§ 3350.) **When proved.**

Testimony: Essential to admissibility of nuncupative will to probate that there be substantial agreement between testimony of witnesses, by whom will is

sought to be proved, and spoken words of decedent as reduced to writing. 142/5, 6 (3) (82 S. E. 246).

CHAPTER 3.

Of Title by Descent and Administration.

ARTICLE 1.

Of Inheritable Property and the Relative Rights of the Heirs and Administrator.

§ 3929. (§ 3353.) **Descent to heirs.**

Cited. 143/497, 500 (85 S. E. 742); 17 App. 59, 63 (86 S. E. 272).

Contribution: Neither residuary legatee nor his guardian can sue to enforce right of contribution of estate, growing out of co-suretyship, even though

administrator has paid all debts and fully administered the estate and has transferred judgment and execution to guardian and although, under the will, legatee was sole legatee, and money which paid judgment and execution

Inheritance; relative rights of heirs and administrator.

- would otherwise have gone to legatee as part of his legacy. 23 App. 734 (1) (99 S. E. 385).
- Debts:** Administrator is entitled to retain share of an heir, in money derived from sale of realty belonging to decedent's estate, in payment of debt which heir owes to the estate, as against, and in preference to, claim of assignee or purchaser from the heir. 20 App. 381 (1) (93 S. E. 55).
- Evidence** here, in suit against one as administrator and guardian, and individually, and others, seeking to reach and apply assets, showed that administrator was conducting business of intestate for benefit of other defendants as real equitable owners. 147/695 (95 S. E. 255).
- Heirs:** Will here construed, and held that upon death of named son of testator, prior to 25th anniversary of birth of daughter of testator, corpus of property and subsequent income therefrom passed to surviving brother and sister, and did not descend as an inheritance to the heirs of the deceased son. 147/114 (92 S. E. 887).
- Life estate:** Where life tenant in personality under foreign will took proceeds of sale advanced to her and acquired land in this State absolutely and unaffected by any rights of remaindermen, it descended on her death to her husband and her son as her heirs. 146/464 (2) (91 S. E. 476).
- Lost deed:** Under this section and section 3657 heir of grantee in unrecorded deed has such interest in land as will authorize him to maintain action to establish copy of deed after it has been lost. 145/137, 138 (4) (88 S. E. 669).
- Pleading:** There is no merit in assignment of error upon allowance of amendment which alleges death of one of original plaintiffs, and prays that petitioners as his heirs at law recover his interest in land. 148/840, 841 (4) (98 S. E. 471).
- Possession:** Where evidence in action of ejectment by heirs at law shows possession of land, under deed, by their father at time of his death, this without more, would entitle them to recover. 147/315 (2) (93 S. E. 895).
- Suit to recover upon account due decedent by one who had purchased certain articles, in which it was alleged that estate owed no debts and that there was no administration, could not be maintained by wife and heirs of decedent, where it was brought, not against original debtor, but, subsequently to his death, against administrator of sole heir of debtor, the administrator having sold real estate which the heir referred to had taken possession of and claimed as his own. 148/352 (1) (96 S. E. 858).
- Where one died in possession of land under bona fide claim of right thereto, there was prima facie evidence of title in him; and his heirs or devisees may recover on proof of such possession, unless a better adverse title is shown by defendant. 149/170 (1) (99 S. E. 532).
- Heirs at law are entitled to possession of land owned by intestate at time of death until it is needed by administrator for purposes of administration, that is, for purpose of paying debts and making legal distribution to the heirs. 19 App. 660, 661 (7) (91 S. E. 1066).
- Realty:** Title to realty, upon death of owner, descends directly and vests immediately in heirs of law; it does not, as at common law, vest in heir at law absolutely, but the descent may be intercepted, and possession claimed and held by administrator for purposes of administration. 20 App. 381 (2) (93 S. E. 55).
- Sale:** Where note is executed for price of heir's interest in land, and thereafter administrator sells land and divests heir's title, she can not recover on note, though maker was purchaser at sale. 14 App. 194 (80 S. E. 660).
- Security:** Where legal title to land has been conveyed to secure repayment of debt, and is outstanding and the debt is unpaid at time of grantor's death, such title does not descend directly to his heirs at law. 149/825 (7) (102 S. E. 526).
- Widow:** When man dies intestate, leaving widow and children, title to realty vests in latter, subject only to former's right to take child's part or have dower assigned therein; and unless it affirmatively appears that, within time prescribed by law, she elected to take child's part, no presumption will arise

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that she ever had any vested estate in fee in such realty. 146/719 (92 S. E. 211).

Administrator's deed duly executed and recorded, reciting order to sell, sale, and valuable consideration, and conveying certain lot, except widow's dower, and certain other land, was notice to subsequent purchasers that vendee and those who held under him took only the last mentioned land; and one who acquired possession of entire lot under pretended claim, including remainder

in dower, would acquire no title to such remainder as against heirs at law, who sue in ejectment for such remainder within seven years from date of death of tenant in dower. 147/315, 316 (2-b) (93 S. E. 895).

Where owner of estate in realty, which estate survives him, dies without lineal descendants, his wife, being his sole heir, may maintain action to recover land owned by him at his death. 148/675 (1) (97 S. E. 856).

§ 3930. (§ 3354.) **Husband sole heir.**

Cited. 140/699, 706 (79 S. E. 561), 769, 772 (79 S. E. 903).

Administration of estate: Charge that if jury were satisfied certain person died without heirs, and there was no administration on her estate, and her husband was sole heir at law, that under such circumstances he would be entitled to recover, though not technically correct, was not error requiring grant of new trial. 148/312 (3) (96 S. E. 630).

Debts: Where wife dies intestate, leaving no surviving child or descendant of child, husband can not maintain suit to recover on debts due estate of wife, although her estate owes no debt and

there is no administration. 146/123 (90 S. E. 856).

Remainder interest: Upon death of child in esse when deed was executed, in whom remainder estate was vested, before death of life tenant, leaving husband and child, latter also dying before life-tenant's death, husband succeeded by inheritance to share of deceased remainderman. 145/858 (2) (90 S. E. 65).

Will here construed and held that there was an intestacy as to a parcel of land, and that the same passed to husband of testatrix as her sole heir. 143/47 (84 S. E. 115).

§ 3931. (§ 3355.) **Rules of inheritance.**

1.

Another husband: Where man who was married to woman who had living husband died, no title to his property passed to her, and deed by her purporting to convey property of decedent was without effect, and her grantee took no title as against heirs of decedent. 146/367 (1) (91 S. E. 115).

Collateral heirs: Upon death of man leaving widow but no lineal descendants, his estate descends to widow by inheritance, and death of widow, without known heirs, will not vest her inheritance in collateral heirs of her deceased husband. 147/138 (4) (93 S. E. 93).

Election: Wife is not required to elect whether she will take a dower or the whole estate as heir. 147/138 (3) (93 S. E. 93).

Personal representative: Widow whose husband died intestate, leaving no lineal descendants, where it appears that he left no unpaid debts, entitled to his whole estate, without taking out letters of administration; and, being so entitled, she is his personal representative. 22 App. 693 (1) (97 S. E. 111).

Suit: Where owner of estate in realty, which estate survives him, dies without lineal descendants, his wife, being his sole heir, may maintain action to recover land owned by him at his death. 148/675 (1) (97 S. E. 856).

Witnesses: Widow, whose husband died intestate leaving no lineal descendants, is personal representative of intestate, within meaning of section 5858 (1), and in suit by her to recover land which de-

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pendants claim by reason of alleged parol contract with deceased, together with possession and valuable improvements made, defendants are not com-

petent witnesses to testify as to statements made to them by intestate, relied on to establish alleged contract. 149/290 (1) (99 S. E. 872).

3.

Election: Where a widow and her children sued to partition land, and she had never applied for dower, and there had been no administration, it could not be declared as matter of law that she was not entitled to recover. 141/629 (2) (81 S. E. 895).

When man dies intestate, leaving widow and children, title to realty vests in latter, subject only to former's right to take child's part or have dower assigned therein; and unless it affirmatively appears that, within time

prescribed by law, she elected to take child's part, no presumption will arise that she ever had any vested estate in fee in such realty. 146/719 (92 S. E. 211).

Where husband devised \$1,000 in cash to his wife and gave her income from \$4,000 for life or until her marriage, when principal was to revert, the widow, having accepted the \$1,000 had no election to take a child's part in the estate, where there were two children. 147/449 (94 S. E. 553).

5.

Cited. 143/342, 345 (85 S. E. 105).

General Note.

Collateral heirs: Upon death of man leaving widow but no lineal descendants, his estate descends to widow by inheritance, and death of widow, without known heirs, will not vest her inheritance in collateral heirs of her deceased husband. 147/138 (4) (93 S. E. 93).

Homicide: Fact that an heir kills person from whom he expects to inherit

will not change application of statutes of descent. 21 App. 416 (94 S. E. 602).

Legal heirs: Under a will of a testator who left a widow and eight children, directing that the residue of the estate be distributed equally among testator's legal heirs, the widow was not included in such disposition. 140/691 (2) (79 S. E. 772).

§ 3933. (§ 3357.) **Right of administrator.**

Cited. 143/497, 500 (85 S. E. 742); 147/235, 240 (93 S. E. 411).

Contribution: Neither residuary legatee nor his guardian can sue to enforce right of contribution of estate, growing out of co-suretyship, even though administrator has paid all debts and fully administered the estate and has transferred judgment and execution to guardian and although, under the will, legatee was sole legatee, and money was paid judgment and execution would otherwise have gone to legatee as part of his legacy. 23 App. 734 (1) (99 S. E. 385).

Destruction of property: Administrator could not enjoin destruction of building by residuary legatee of realty, where estate had been administered except as to pecuniary legacies. 145/140, 141 (2) (88 S. E. 670).

Ejectment: Where, in action for land petition sought recovery to land which came to grantor in deed as beneficiary under will, but which was not in terms described, and other land adequately described, it was error to sustain general demurrer on grounds (a) that there was no allegation by plaintiffs, who sued as heirs at law, that there was no administration on estate, or, if so, that administrator assented to suit, or (b) that defendant was chartered railroad company, and petition failed to allege whether land was used for necessary railroad purposes, and that ejectment will not lie against railroad company. 148/539 (2) (97 S. E. 534).

Heirs: Before heirs at law can recover land of estate, they must allege and prove that there was no administration, or that administrator, if there

Inheritance; relative rights of heirs and administrator.

was one, assented to their bringing suit. 141/597 (1) (81 S. E. 860); 142/132 (2) (82 S. E. 561).

Where plaintiffs in ejectment claimed title as heirs at law, it is incumbent on them, in order to recover, to show that there is no administration upon estate of decedent, or, if administration, that they have consent of administrator to sue. 147/206 (1) (93 S. E. 201).

Where heirs at law bring ejectment, general rule is that in order for them to recover it is necessary for them to show that there is no administration upon decedent's estate, or, if there is administration, that they have the consent of the administrator to bring the action. 148/79 (1) (95 S. E. 964).

This rule is subject to modification that under peculiar circumstances, as where administrator makes collusive conveyance for purpose of defrauding those interested in the estate and of obtaining personal benefit for himself, and refuses to give his consent for heirs to sue, they may bring equitable action against administrator and person or persons charged with being in collusion with him, for purpose of protecting their rights. *Id.* 79 (2).

There is no merit in assignment of error upon allowance of amendment which alleges death of one of original plaintiffs, and prays that petitioners as his heirs at law recover his interest

in land. 148/840, 841 (4) (98 S. E. 471).

Legatees: Executors of estate, in action to recover lands of testator for purpose of executing will, represent legatees under will, remaindermen as well as life tenants. 147/427, 428 (2) (94 S. E. 468).

Life estate: Where remainder estate failed because of lack of takers, on life tenant's death grantor or his heirs were entitled to right of entry, and executor of grantor was entitled to recover land of widow of deceased life tenant. 147/12 (3) (92 S. E. 540).

Personalty: Suit in equity can not be maintained at instance of some of the distributees of the estate, to recover personal property thereof, except legal representatives of such estate, unless there be collusion, insolvency, unwillingness to collect the assets, or some other like special circumstances. 149/42 (1) (99 S. E. 27).

Possession: Administrator was not authorized to recover possession of premises held by defendant under his son, who had succeeded to interest of certain of the heirs at law of plaintiff's intestate. 19 App. 660, 662 (8) (91 S. E. 1066).

Stranger: While under this section administrator may sue for benefit of estate, he can not sue for use of stranger. 144/508 (87 S. E. 676).

§ 3934. (§ 3358.) May recover from heirs, etc., when.

Cited. 147/235, 240 (93 S. E. 411).

Evidence here in action by administrator to recover portion of land of which his intestate died possessed held to sustain verdict for defendant. 141/680 (81 S. E. 1106).

Res judicata: Judgment adverse to plaintiffs in action by heirs against

purchaser of land at sheriff's sale, seeking cancellation of sheriff's deed and accounting for rent and to have title decreed in plaintiffs, will not bar ejectment against purchaser by administrator where it is necessary for administrator to have the property to pay debts. 142/198 (82 S. E. 548).

Different kinds of administrators and rules for granting letters.

ARTICLE 2.

Of Administration.

SECTION 1.

Different Kinds of Administrators and Rules for Granting Letters.

§ 3935. (§ 3359.) Temporary letters.

Cited. 140/769, 770 (79 S. E. 903).

Stated and applied. 145/867 (2) (90 S. E. 69).

Agreement: Authority conferred by this section can not be augmented by private agreement between temporary administrator and widow of deceased. 145/534 (1) (89 S. E. 618); 20 App. 827 (93 S. E. 498).

Cancellation of deed: Estate of decedent can not be affected by suit instigated against temporary administrator by grantor of land, to cancel deed executed by him to decedent while in life. 147/143 (1) (93 S. E. 292).

Distribute estate: Temporary administrator may sue to collect debts or personal property of intestate but

has no authority of law to deal with the estate of the intestate. 145/867 (2) (90 S. E. 69).

Pendente lite grant: Where temporary administrator was appointed and applied for appointment as permanent administrator, but caveat was filed and another appointed, and appeal taken under section 4999, temporary administrator remained such under this section, and ordinary could not by ex parte order on petition appoint administrator pendente lite. 144/289 (1) (86 S. E. 1082).

Powers: Temporary administrators have only the right to collect and preserve the estate. 232 Fed. 921, 923 (16).

§ 3936. (§ 3360.) Bond of temporary administrator.

Cited. 140/769, 770 (79 S. E. 903).

Payment by surety: Where auditor found for plaintiff in action on bond of temporary administrator and against cross-claim of such administrator, and it appeared that surety had voluntarily

paid to plaintiff amount found in his favor, without consent of temporary administrator, judgment overruling exceptions filed by temporary administrator was not erroneous. 145/867, 868 (4) (90 S. E. 69).

§ 3937. (§ 3361.) Temporary administrator may sue.

Cited. 140/769, 770 (79 S. E. 903).

Land: Temporary administrator takes no interest in land of estate, and can not bring action for its recovery or consent to such an action being brought. 147/143 (1) (93 S. E. 292).

Trust: Temporary administrator may not maintain action to have city court set

up trust in property alleged to have been conveyed to defendant, and to set up title in plaintiff's intestate, and recover for conversion of trust fund arising from defendant's sale of property, and court was without jurisdiction to determine cause. 23 App. 793 (99 S. E. 706).

§ 3938. (§ 3362.) Pendente lite.

Injunction: Administratrix may file petition to enjoin railroad company from unlawfully taking possession of land

left by decedent, and constructing its road without first acquiring right to do so. 140/769 (1) (79 S. E. 903).

Different kinds of administrators and rules for granting letters.

§ 3943. (§ 3367.) Rules for granting letters.

1.

Cited. 144/359, 362 (87 S. E. 286).

Widow: Conclusion by father of decedent, "From my knowledge of this lady I would say she is not a fit person and a proper person to manage

an estate," did not raise such an issue as would defeat her legal right as wife of decedent to appointment as representative of his estate. 22 App. 679 (97 S. E. 98).

2.

Fraud: Judgment granting permanent letters of administration to one who is neither next of kin nor creditor, nor otherwise entitled to administration, may be set aside by direct proceeding at instance of heirs at law on ground that it was falsely and fraudulently represented in application that

applicant was next of kin to decedent. 142/408 (2) (83 S. E. 113).

Heirs: Right to nominate administrator is confined to distributees, who are next of kin at time of death, and does not extend to an heir of an heir of the deceased. 143/738 (3) (85 S. E. 877).

3.

Cited and applied. 143/738 (1) (85 S. E. 877).

Petition: Allegation in petition for letters of administration that petitioner "is entitled under the law to be ap-

pointed administrator of said estate, being requested so to do by the relatives of said deceased," does not negative existence of necessary jurisdictional facts. 147/540 (2) (94 S. E. 1009).

5.

Charge to jury in proceedings for issuance of letters of administration that if they believed, from the evidence, that decedent left an estate, or if they believed he had an estate before his death, and that he owed debts and conveyed his property to his wife, to defeat his creditors, and that she held the property, and if they believed her purpose in making the caveat was to prevent administration, for purpose of defeating creditors, then the jury should find the issue against them, was not erroneous. 22 App. 477 (4) (96 S. E. 333).

Evidence here in proceeding by bank as creditor for letters of administration held to sustain verdict in favor of bank as against caveat alleging that decedent left no estate that required administration, etc. 22 App. 477 (5) (96 S. E. 333).

Fl. fa. in favor of a guano company

against decedent, obtained in a city court at a certain time, was admissible in proceeding for issuance of letters of administration over objection that it had not been proven that the caveators knew anything about the suit, and did not show any notice to them. 22 App. 477 (2) (96 S. E. 333).

Quantum meruit: Caveator having enforceable demand against estate of decedent, under alleged contract to bequeath at her death a child's part of her estate to caveator, could only recover upon quantum meruit; no basis for interposition of caveat, as a creditor, on ground of services rendered or other consideration supplied to decedent, is furnished by any definite allegation in caveat as to existence of claim for money, or for any precise or fixed demand against estate of decedent. 20 App. 311, 312 (2) (93 S. E. 29).

6.

Petition: Allegation in petition for letters of administration, that petitioner "is entitled under the law to be appointed administrator of said estate,

being requested so to do by the relatives of said deceased," does not negative existence of necessary jurisdictional facts. 147/540 (2) (94 S. E. 1009).

The appointment of administrators, their bond and removal.

8.

Equity: Where persons not related to or creditors of deceased obtained administration, equity will interpose to protect endangered rights of citizens of another State. 232 Fed. 921 (2).

Order granting administration in disregard of this section is void, and may be so declared at suit of any one lawfully concerned. 232 Fed. 921, 922 (6).

General Note.

Cited and applied. 145/405, 406 (89 S. E. 364).

SECTION 3.

The Appointment of Administrators, Their Bond and Removal.**§ 3969. (§ 3393.) Application.**

Estate: There can ordinarily be no administration unless there is an estate to be administered. 143/62 (84 S. E. 125).

Though there is no tangible property to administer, yet, where there is something for an administrator to do which may create an estate, an administrator may be appointed. Id.

Where applicant for letters of administration alleged that he was a creditor and that decedent left large estate, and caveat alleged that decedent left no estate, error to strike caveat and direct verdict on ex parte testimony offered by applicant. Id.

Judgment: Petition here to set aside

judgment of court of ordinary appointing administrator and to revoke his letters was not subject to general demurrer. 145/405 (2) (89 S. E. 364).

Jurisdiction to administer on estate is in county where intestate resided at time of his death, and fact that certain persons alleged to be heirs of intestate, and some of defendants who objected to appointment of administrators in court or ordinary, resided in another county, was insufficient to draw to that county jurisdiction to enjoin proceedings in court of ordinary of county of intestate's residence, and to administer estate in equity. 146/615 (91 S. E. 779).

§ 3972. (§ 3396.) Bond of administrator.

Cited. 143/497, 503 (85 S. E. 742); 145/660, 661 (89 S. E. 746).

Necessity: There can be no administration without bond. 143/62 (84 S. E. 125).

Sureties on administrator's bond not

liable for administrator's obligation to pay money legally borrowed or for money tortiously obtained by the administrator, although used for the benefit of the estate. 141/326 (80 S. E. 1003).

§ 3974. (§ 3398.) Suit on bonds.

Discharge: Where plaintiff in suit on administrator's bond alleges administrator's discharge, in order to escape effect of that judgment on ground that it was procured by fraud he must further allege facts upon which charge of fraud is based. 146/146 (2) (90 S. E. 853).

Expenditures: Petition by sureties of administratrix to enjoin suit on judgment against administratrix, in so far

as it set up that administratrix had expended corpus of share of distributee, was demurrable, where it was not shown that any proper orders from authorized court had allowed such expenditures or that they had been set forth in return properly made and allowed. 147/711 (2) (95 S. E. 251).

Heirs: On trial of suit brought by ordinary for use of heirs at law, against administrator and sureties, suit being

The appointment of administrators, their bond and removal.

based on judgment by ordinary, on citation for settlement, in favor of heirs against administrator, which judgment administrator refused to pay, sheriff having returned nulla bona as to him, it was not error to strike paragraph of answer that uses of plaintiff were not heirs at law of decedent, and that sureties were not bound by judgment of ordinary against administrator. 146/290 (1) (91 S. E. 50).

Judgment: In suit brought by ordinary, for use of heirs at law of decedent, on judgment rendered by ordinary against administrator and sureties, plaintiff may recover amount of judgment against the administrator and sureties. 146/290 (1-b) (91 S. E. 50).

Judgment of ordinary against administrator and sureties, on citation for settlement, can not be collaterally attacked by the sureties, or by the administrator, in answer to suit by the ordinary, for use of heirs at law of decedent. 146/290, 291 (1-c) (91 S. E. 50).

Where upon citation for settlement judgment was rendered against administratrix and in favor of distributee of estate, such judgment was binding and conclusive upon administratrix, but not upon sureties upon her bond, who might show that judgment was obtained by collusion and fraud and that administratrix had lawfully paid over distributee's share of estate. 147/711 (1) (95 S. E. 251).

Judgment against administrator, in action on alleged debt of intestate, when defendant has failed to plead

want of assets, is conclusive as to question of sufficiency of assets to pay the debt; as to surety upon administrator's bond, judgment is not conclusive upon such question, but is prima facie evidence only, and when sued upon the bond the surety may plead and prove a deficiency of assets in the hands of his principal liable to payment of the debt. 21 App. 39 (1) (93 S. E. 498).

In suit against sureties on bond of administrator, prima facie proof of devastavit may be made by introducing in evidence the judgment against the administrator, and showing by proper entries upon execution issued thereon that there is no property upon which to levy. 21 App. 39 (2) (93 S. E. 498).

Where judgment which is foundation of suit appears to have been obtained, not against administrator, but against decedent in his lifetime, against whom execution had issued, and where it appears that first notice received by administrator as to claim was more than two years after his qualification as such, and nothing is shown to indicate that funds coming into his hand were not disbursed according to law, or that waste was committed, it was not error to grant nonsuit. 21 App. 39 (3) (93 S. E. 498).

Petition here in action by administrator de bonis non against original administrator and surety on his bond for failure to enforce bid at sale of decedent's land was subject to general demurrer. 146/274 (91 S. E. 55).

§ 3978. (§ 3402.) Defaulting administrator.

Bank deposit: Where administrator deposits funds of estate in bank of good standing which subsequently fails, and funds are thereby lost, he is prima facie liable, unless funds were deposited in name of administrator of particular estate to which funds belonged; where fund is deposited in name of administrator merely as administrator, he is prima facie individually liable for loss of the money. 19 App. 74 (90 S. E. 973).

Creditor of estate has such interest as to authorize him to bring to ordinary

by petition information that administrator refuses and fails to make returns as required by law and to invoke discretionary action provided by this section. 145/829, 830 (2-a) (90 S. E. 40).

Non-payment of claim: Person alleging himself to be creditor of an estate can not petition for revocation of letters of administration merely because administratrix has not paid his claim. 145/829 (1) (90 S. E. 40).

Failure or refusal of administratrix to pay debt alleged to be due petitioner does not constitute such mis-

Of inventories, appraisements, and returns.

management of estate as to be ground for revocation of her letters, even if there has been adjudication that debt

is lawful one against the estate. 145/829 (1) (90 S. E. 40).

§ 3982. (§ 3406.) **Account with heirs.**

Evidence: Testimony, in action by widow and children for accounting and partition, that intestate requested that his land should remain as it was until his wife's death, and then be sold and divided, was erroneously admitted, where it did not appear to whom such request was made, or that it had any effect on the conduct of the parties. 141/629, 630 (11) (81 S. E. 895).

Heirs: In absence of special circumstances, such as collusion by administrator with other party, heirs can not have equitable accounting for personal property, even though there be

no administration. 141/629, 630 (7) (81 S. E. 895).

Petition here by heirs against administratrix and surety on bond for accounting was not subject to general demurrer. 145/289 (2) (88 S. E. 966).

Surety: Surety of administratrix here having had land sold to him as highest bidder, he paying no part of the consideration but receiving deed and making quit-claim of land, receiving substantial consideration, heirs are entitled to recover of him. 145/289, 290 (88 S. E. 966).

SECTION 4.

Of Inventories, Appraisements, and Returns.

§ 3992. (§ 3416.) **Annual returns.** On or before the regular term of the court in [January] (a) in each and every year, every administrator shall make a true and just account, upon oath, of his receipts and expenditures in behalf of the estate during the preceding year, together with a note or memorandum of any other fact necessary to the exhibition of the true condition of such estate. To this account shall be attached copies of all the vouchers showing the correctness of each item, or, at the option of the executor or administrator, the originals may be filed with the return, and shall remain in the ordinary's office for thirty days. If any of the receipts be for cotton, corn or other products sold, the voucher shall show the quantity of each, the price at which it was sold, the name of purchaser, and the time of sale.

Act 1792, Cobb, 306. Act 1799, Cobb, 312. Act 1810, Cobb, 317. Acts 1855-6, p. 145. 1862-3, pp. 138, 139. (a) Acts 1920, p. 79.

§§ 3852, 3987, 4069, 836, 3579.

Balance: Where return of administrator was never approved by ordinary, who found against the return, except as to two items admitted to be correct, court did not err in directing verdict for the amount the administrator had received in cash less the amount of the items admitted to be correct. 22 App. 738 (3) (97 S. E. 261).

Burden of proof: Administrator who, in his answer, admitted that he had made

no return prior to one made after he was cited for settlement, had burden of showing that his returns were correct. 22 App. 738 (2) (97 S. E. 261).

Failure of executor or guardian to make returns is omission of duty, and therefore a breach of trust, and throws on him the burden of proving to satisfaction of court and jury that he has discharged his duty with fidelity. *Id.*

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§ 3993. (§ 3417.) **Vouchers.**

Certified copies: Where receipts and vouchers by heirs at law are filed as part of returns of administrator, and are without objection duly entered of record, certified copy of such receipts and vouchers or original record if certified transcript be not demanded, is

admissible whenever relevant and material to any issue in any court of law and equity; certified transcript of returns of administrator is receivable in evidence upon issue involving due administration of estate. 147/601, 602 (8) (95 S. E. 13).

SECTION 5.

Of Managing the Estate and Paying the Debts.

§ 3997. (§ 3421.) **Payment of debts by administrator.**

Cited and applied. 145/660, 661 (89 S. E. 746); 147/657, 661 (3) (95 S. E. 238).

Decree: Where plaintiff's rights as heir were subject to debts, and payments had been made under consent order, fact that decree providing for advertisement to ascertain debts, and for further directions essential to final accounting, and any balance to be paid

to plaintiff, was not erroneous. 142/734, 735 (4) (83 S. E. 667).

Note: Where administrator had knowledge of decedent's agreement to pay note past due, but which was not filed against estate, his distribution of assets of estate is no defense to action by promise. 143/721 (5) (85 S. E. 895).

§ 3998. (§ 3422.) **Payment of debts by heirs.**

Distribution: This section covers only cases in which, without notice of an existing debt, the estate has been distributed to the heirs. 143/703 (2) (86 S. E. 780).

Suit may be instituted against heirs of an estate, where estate has been distributed to them without notice of existing debt, and creditor may compel them to contribute pro rata to the

payment of his debt. 21 App. 623 (1) (94 S. E. 808).

Equity: Suit instituted by creditor against heirs of estate, where estate has been distributed without notice of existing debt, does not necessarily have to be brought in court of equity, but may be instituted in court of law. 21 App. 623 (1) (94 S. E. 808).

§ 3999. (§ 3423.) **Time of payment.**

Cited and applied. 145/660, 662 (89 S. E. 746).

§ 4000. (§ 3424.) **Priority of debts.**

1.

Burial expenses: Year's support when allowed is to be preferred before all other debts against estate, including burial expenses and expenses of last illness. 146/252, 253 (1-a) (91 S. E. 34).

Liens: Title of defendant's widow under judgment granting her year's sup-

port was subservient to title of plaintiffs under bill of sale executed by defendant's husband to secure note given as collateral for advancement for farm supplies and bill of sale by widow to secure advances. 144/118 (2) (86 S. E. 219).

Of managing the estate and paying the debts.

2.

Mausoleum: Where sole issue for determination was whether mausoleum provided by executors as "suitable protection for the grave of the deceased" was in fact suitable, considering the cost thereof and the size of the solvent estate, Court of Appeals will not review finding of trial judge who determined such issue, the amount contracted for not being itself so great

as to compel contrary conclusion. 22 App. 148 (95 S. E. 719).

Purchase-money mortgage: In payment of debts of decedent, lien on personal property, evidenced by purchase-money mortgage which expressly states that it is executed and delivered for purpose of securing debt for such purchase-money, is inferior to lien for expenses of decedent's funeral. 20 App. 328 (93 S. E. 28).

3.

Cited and applied. 145/660, 663 (89 S. E. 746).

Commissions earned by administrator or personal representative of estate are part of necessary expenses of administration, and, in settlement with heirs, administrator is not chargeable with failure to apply his commissions to debt due by him to estate, regardless of insolvency of administrator. 20 App. 381 (4) (93 S. E. 55).

Premium on bond: Where will provided

that executor should administer entire estate even to distribution after termination of life estate, and that he be excused from giving bond, and finding that prior death of executor was not contemplated by testator was authorized, premium of bond of administrator de bonis non cum testamento annexo should not be charged against executor's distributive share of the estate but against estate itself. 148/208 (96 S. E. 175).

8.

Account: Where decedent in his lifetime assented to correctness of account rendered him, it became, after such assent, liquidated demand, and as

such entitled to rank with promissory notes in payment of debts. 144/542 (1) (87 S. E. 661).

General Note.

Cited and applied. 145/660, 661 (89 S. E. 746).

Priorities of claims here against pro-

ceeds of intestate's realty determined. 142/538 (83 S. E. 133).

§ 4001. (§ 3425.) **Estate bound for debts.**

Evidence: Where executrix pleaded conveyance of property by her testator as settlement of claim, but there was no evidence that a deed, reciting love and affection and payment of \$10.00 as consideration, was intended as a settlement of the debt, error to admit in evidence the deed or title of testator to the land. 13 App. 594 (3) (79 S. E. 523).

Written agreement between executrix and claimant, reciting that latter claimed a certain sum without interest, which claim was not prejudiced by the agreement, not admissible as an agreement not to claim interest or

as an estoppel from claiming interest. Id. 594, 595 (4).

Testimony as to market price of guano in year in which the guano in the account sued on was delivered to decedent was admissible in behalf of plaintiff in action against administrator for price. 22 App. 730, 731 (4) 97 S. E. 260).

Plea of payment in action for board and cash furnished decedent was insufficient where it averred that defendant could not allege when and to whom payment was made for want of sufficient information. 14 App. 298 (1) (80 S. E. 698).

Of managing the estate and paying the debts.

§ 4002. (§ 3426.) **Collection of debts.**

Charge: In suit by administratrix against heir, with issue as to whether defendant was indebted to plaintiff on notes, instruction as to existence and possession of notes held erroneous, in view of evidence. 147/607 (2) (95 S. E. 6).

Contract between beneficiaries of estate and executor in his individual capacity as mortgagor did not supersede any general right in beneficiaries to recover attorney's fees and expenses in suit to re-establish mortgage, which provided that beneficiaries should bid in property and reconvey it to mortgagor upon his paying his debt, but made no provision for attorney's fees and expenses. 141/727, 729 (6) (82 S. E. 451).

Federal Employers' Liability Act: Recovery for death of servant under Federal employers' liability act, being for benefit of the named persons, is not an asset. 144/38 (2) (85 S. E. 1013).

Heir: Administrator is entitled to retain share of an heir, in money derived from sale of realty belonging to decedent's estate, in payment of debt which heir owes to the estate, as against, and in preference to, claim of assignee or purchaser from the heir. 20 App. 381 (1) (93 S. E. 55).

§ 4003. (§ 3427.) **Collection by heirs et al.**

Stated. 21 App. 272, 274 (94 S. E. 254).

§ 4004. (§ 3428.) **Compromises by administrator.**

Arbitration: Administrator may in good faith and with proper prudence submit to arbitration matters in controversy relative to estate. 144/613 (3) (87 S. E. 1068).

Authority to compromise need not be revoked or set aside in order to attack previous private transfer procured by fraud. 140/141, 147 (78 S. E. 935).

Compensation: Where administratrix of deceased executrix and creditor of latter's estate failed to agree on amount of compensation for his services, administratrix would be authorized to submit such issue to arbitration. 148/176 (96 S. E. 214).

Judgment: Though administrator agreed that his individual indebtedness should be received as payment on judgment for him as administrator, such indebtedness can not be credited on the judgment. 144/8, 9 (4) (85 S. E. 1048).

Parties: Petition in action on notes given for land left by testator and payable to plaintiff's intestate individually and as executrix not demurrable on ground that representative of testator's estate was not made party plaintiff. 144/114 (1) (86 S. E. 223).

Pleading: Petition here in action by administrator on notes stated cause of action. 144/114 (1) (86 S. E. 223).

Title: If husband, acting as agent for wife, exchanged tract of land belonging to her for another tract, and promised to have property conveyed to his wife, and she, discovering that this had not been done, demanded deed placing title in her, but he failed and neglected to execute and deliver such deed during her life, her representatives or her heirs could maintain suit against him, or against his representatives after his death, seeking decree placing title in estate of wife. 147/657 (1) (95 S. E. 238).

Fraud: While executor may compromise contested or doubtful claims for or against estate, such authority is no warrant to executor to enter into collusive and fraudulent agreement and thereby bind estate; such agreement is open to attack in proper proceeding by legatees. 148/567, 568 (3) (97 S. E. 637).

Insurance: No compromise for insurance agent to buy policy from administratrix for himself at small amount and collect it in full. 140/141 (3), 147 (78 S. E. 935).

§ 4009. (§ 3433.) **Debts barred by limitation.**

Cited. 17 App. 59, 67 (86 S. E. 272).

Of managing the estate and paying the debts.

§ 4010. (§ 3434.) **Counsel fees, when allowed.**

Maladministration: Counsel fees and expenses incurred by administrator with will annexed in defending proceeding by legatees to revoke letters on ground of mismanagement, which proceeding was voluntarily discontinued, not chargeable against legacies due legatees who instituted proceeding, in final settlement; where such charges are proper they go against the general estate. 140/710 (79 S. E. 780).

Probate: Executor under will probated

in common form, called upon to probate it in solemn form, entitled to reasonable counsel fees out of estate, notwithstanding will may be refused probate. 140/707 (1) (79 S. E. 855).

If executor in bad faith and in fraud of rights of heirs attempts to probate pretended will, not entitled to reimbursement for expenses incurred. *Id.* 707 (2).

Good faith of counsel of executor is immaterial. *Id.* 707 (3).

§ 4012. (§ 3436.) **May continue business of deceased.**

Loss: In equitable suit by legatees against executors for accounting, referring to partnership property, where executor conducted hotel partnership property, with knowledge and assent of legatees, there was no error in refusing to charge executor with loss accrued in running such hotel. 146/525, 523 (7) (91 S. E. 780).

Petition here in action against defendant as executor, and seeking judgment against him as such, generally against

the estate of testator, and specially against certain land described in a deed executed by such executor, for money loaned to operate farms of the estate, set out cause of action, and it was erroneous to dismiss action on general demurrer. 147/444 (94 S. E. 556).

Temporary administrator: Provision as to continuance of business has no application to temporary administrators. 145/867 (2) (90 S. E. 69).

§ 4013. (§ 3437.) **May contract for labor.**

Business: Surviving partner was properly allowed a reasonable charge for services in conducting hotel partnership

property. 146/525, 526 (7) (91 S. E. 780).

§ 4014. (§ 3438.) **Duty as to contracts.**

Legacy: Petition alleging that certain person died intestate on certain date, that defendant was duly qualified administrator, that plaintiff lived with decedent for 35 years, working for him as a farm hand, at his request and upon his assurance that if plaintiff would be faithful servant, decedent would provide for plaintiff in his will, by leaving sum of money, etc., that plaintiff was faithful servant and complied with his part of contract, and

that services rendered were reasonably worth \$400 per year, and were accepted by decedent, set forth cause of action. 18 App. 730 (90 S. E. 488).

Note: Suit in justice's court by summons against administratrix, on note given by her intestate, copy of which was attached to summons, was substantially against her in her representative capacity. 143/703, 704 (5) (85 S. E. 830).

§ 4015. (§ 3439.) **Twelve months exemption from suit.**

Accounting: Where husband who invested wife's separate estate recognized it as trust for her so long as she lived, and after her death for use of her heirs at law so long as he lived, limitations as against demand for accounting would not be applicable, but where husband's administrator attempted to

administer all property left by his intestate, limitations would begin to run in favor of the administrator, and suit for accounting commenced against administrator more than ten years thereafter would be barred. 147/235 (2) (93 S. E. 411).

Advances by representative: Permanent

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administrator is exempt for 12 months from date of qualification from suit by temporary administrator for accounting and settlement of claims presented by temporary administrator for money advanced by him and used for estate while acting as temporary administrator, and for compensation for extraordinary services. 145/660 (89 S. E. 746).

Party: Where rule is issued against executrix of deceased defendant, and she objects to being made party on ground that rule should not have issued until after lapse of twelve months

from probate of testator's will, and, though admitting that she received copy of rule by mail, she protests that she was not properly served, and hearing occurs more than twelve months after probating will, judgment making her a party will not be vacated on these grounds, under circumstances of case. 146/442 (1) (91 S. E. 483).

Specific performance: Equitable action against administrator, for specific performance of contract for sale of land, made by his intestate, is not within this section. 147/145 (1) (93 S. E. 296).

SECTION 6.

Of Receiving and Making Titles on Bonds for Title.

§ 4018. (§ 3442.) **Vendee dying, title to heirs.**

Fraud: Though right to sue to protect equitable interest in decedent's estate because of payments under bond for title is in administrator, rule does not apply where administrator and obligor

conspired to defraud those interested in the estate for the personal benefit of the administrator. 142/111 (2) (82 S. E. 560).

§ 4020 (a). **Bonds by guardians for insane persons.** [If any persons during sanity execute a bond to make titles to lands, and afterwards from old age, infirmities or other causes become non compos mentis, without making such titles, the holder or transferee of such bond, after having complied with its conditions, may apply to the ordinary having jurisdiction of the estate for an order requiring the guardian of such person to execute the title according to the terms of the bond, in all cases annexing to his petition a copy of the bond.]

Acts 1920, p. 159.

§ 4020 (b). **Application of sections 4017-4020.** [Sections 4017, 4018, 4019 and 4020, where applicable, shall apply to guardians of persons non compos mentis.]

Acts 1920, p. 160.

SECTION 7.

Of Administrator's Sale.

§ 4021. (§3445.) **Sale of perishable property.**

Stated. 140/148 (1) (78 S. E. 938).

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§ 4022. (§ 3446.) **Sale, how made.**

Stated. 140/148 (1) (78 S. E. 938).

Guardian: Sale of ward's property by guardian must be at public outcry, under this section and section 3066. 16 App. 559 (1) (85 S. E. 766).

Purchase: Action to set aside purchase of land by administrator at his own sale was barred by laches as to person sui juris when not brought for more than 7 years after the sale and the time when such persons become of age. 141/387 (81 S. E. 129).

Such action was not barred by laches as to a person who became of age within less than 7 years before commencement of the action, though brought more than 7 years after sale. *Id.*

Administrator's purchase at own sale is voidable at election of heirs within reasonable time; and where deed was taken to administrator's minor son, such deed may be cancelled. 142/408, 409 (3) (83 S. E. 113).

While right to have decreed void an executor's sale to himself generally rests in the heirs, yet if executor and legatees agree to sham sale and purchase by executor to defeat creditors of an heir, such creditors may attack the sale. 142/422, 423 (2-a) (83 S. E. 99).

Fact that administrator's son purchased at his father's sale will not render sale void though such relationship should be considered in determining whether sale was collusive. 144/31 (2) (85 S. E. 1107).

Rule that administrator can not sell to wife or administratrix to husband does not apply with equal force to sale by administrator to child. *Id.* 31 (3).

Admission of purchaser at administrator's sale that he was not a bona fide purchaser but that he was a by-bidder, and that as ostensible payment he delivered to administrator his

check, which was torn up, and that he immediately deeded property back to administrator, is competent in suit by heirs to recover land formerly owned by ancestor who died intestate only in event there is evidence showing notice to last purchaser of invalidity of administrator's sale, and should be admitted under instructions limiting effect to party making admission. 149/464 (2) (100 S. E. 393).

Duty of attorney at law of administrator conducting public sale of intestate's realty, to cause property to be sold to best advantage of estate, conflicts with attorney's personal interest as purchaser, and on grounds of public policy, if attorney purchases property for himself, sale will be voidable, and may be set aside in court of equity upon motion of heirs at law of intestate, who do not ratify sale, but move to set it aside within reasonable time. 149/697 (1) (101 S. E. 794).

Where heirs who brought suit against administrator and attorney who purchased at the sale of intestate's property to set aside such sale did not receive any of the purchase money, they were not required, under the maxim that he who seeks equity must do equity, to refund to the attorney the amount of money paid by him for the land. 149/697, 698 (2) (101 S. E. 794).

Time: Where deed of administrator with will annexed recites that land was exposed for sale under and by virtue of order of court of ordinary, and order required that administrator "proceed in the premises as required by the statutes in such cases made and provided," deed will be held valid, although not reciting that sale took place within hours required by the statute, in absence of anything to show contrary. 149/683 (3) (102 S. E. 162).

§ 4023. (§ 3447.) **Terms of sale.**

Retaining title: Administrator who sold on credit to insolvent purchasers mules which he had bought for, and with funds of, the estate, taking no security

except retention of title, was liable for loss thus occasioned. 143/483 (85 S. E. 317).

Of administrator's sale.

§ 4024. (§ 3448.) **Sale of wild lands.**

Ratification: Subsequent passing by ordinary of order empowering executors to sell testator's wild land at their

discretion was ratification of prior sale of particular lot of wild land by executors. 143/756 (3) (85 S. E. 917).

§ 4026. (§ 3450.) **Land, when sold.**

Debts: Court of ordinary may order sale of devised real estate for purpose of paying debts, provided it be necessary to sell same for such purpose. 149/693, 696 (101 S. E. 807).

Realty of intestate may be sold by administrator for payment of debts of intestate and for distribution to his heirs. 20 App. 381 (3) (93 S. E. 55).

Deed accompanied by order granting leave to sell is admissible as muniment of title without production of letters of administration. 142/448, 449 (2) (83 S. E. 200).

Description: Order describing land as located in certain county and known by certain name, and lying alongside certain river, followed by description giving calls for three sides of it, was not void for uncertainty. 142/448 (1) (83 S. E. 200).

Where petition by executors merely recited that testator owned land lying in certain county, order authorizing them to sell such portions of such land as they might deem best is void for insufficiency of description. 144/45 (1) (85 S. E. 1054).

On attack upon sale based on order of court where it appeared that at time of sale portions of lots referred to in order had been staked off, and that estate was in possession thereof and not in possession of any other lands, order of sale describing land as "245 acres, more or less, of lot of land No. 109, also 122 acres, more or less, of lot No. 94 in the 4th land district of I. county, Ga.," was sufficiently definite, and was admissible in evidence as authority to administrator to make sale. 148/700 (1) (98 S. E. 345).

Where petition of administrator with will annexed for leave to sell land recites that testator died leaving tract of land in the county, on which he resided, containing designated acreage, upon which court of ordinary rendered judgment granting leave to sell upon administrator's proceeding in the premises as required by statutes in

such cases made and provided, such judgment is not void for lack of legally sufficient description of the land. 149/683 (2) (102 S. E. 162).

Where insertion of wrong lot number of land was, through inadvertence or misadventure, made in order of court of ordinary granting leave to sell land and it appears that testator never owned such lot, but that he did own another lot, which latter lot was the only unimproved lot owned by him, and the record shows that full value was paid, and debts of the estate were presumably discharged with the money paid, sale by executrix conveyed title. 149/693, 697 (101 S. E. 807).

Fraud: If administrator is guilty of imposition and purchaser is influenced in making his bid on account of fraud or misrepresentation of administrator, he is relieviable of his bid. 140/217, 219 (78 S. E. 903).

Where administrator sells property of estate at inadequate price, and where facts show other and corroborating evidence of fraud, sale should be set aside. 146/692 (92 S. E. 62).

Injunction: Fact that application of administrator for order to sell lands did not set forth that sale was necessary for payment of debts or for distribution was not ground for interlocutory injunction. 145/102 (4) (88 S. E. 682).

Where court of ordinary was proceeding to have estate of intestate duly administered, and it did not appear that the administrator's bond would not fully protect interest of heirs, equity would not enjoin the administrator from proceeding to sell or dispose of land, or from administering and distributing its proceeds, in view of rights under sections 4026, 4052, 4055, 4057 et seq. 149/176, 181, 182 (99 S. E. 624).

Minors: The law does not look with favor upon private agreements to divest the title of minors in property in pursuance of such agreement,

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whether made with the minors themselves or with others who have the minors' interest at heart. The policy of the law is that sales, under judicial process, should be unfettered by any private arrangement. 140/217, 220 (78 S. E. 903).

Necessity: Under this section and section 5963 omission from petition of administrator for order to sell land of allegation that sale is necessary for payment of debts or for purposes of administration is amendable defect cured by judgment granting leave to sell. 145/102 (3) (88 S. E. 682).

Where petition of administrator with will annexed to court of ordinary for leave to sell land recites that "such is the situation of the land that no fair division can be made amongst the heirs at law," it must be assumed that legally sufficient reasons were shown to the court, authorizing judgment granting leave to administrator to sell. 149/683 (5) (102 S. E. 162).

Notice: Judgment of court of ordinary granting leave to administrator with will annexed to sell land is not void for lack of notice or service upon owners of land, where petition for leave to sell alleges that petitioner "has given due notice of his intended application," and judgment of court is based on such petition; "due notice," nothing appearing on face of record to contrary, means full compliance with law in regard to notice and service. 149/683 (4) (102 S. E. 162).

Order of ordinary correcting judgment ordering sale of land by executrix was not ineffectual, because guardian of person and property of minor devisees was not made party, where minors themselves were served personally, guardian ad litem was appointed, and service duly accepted by such guardian, and it did not appear that guardian of person and property did not have actual notice of proceed-

ing, and, if a party, that he could have offered any legal objection. 149/693, 696 (101 S. E. 807).

Order by court of ordinary reciting that administratrix had applied for leave to sell land was admissible here in collateral proceeding, over objection that it did not sufficiently describe the land. 143/98, 99 (3) (84 S. E. 426), 727 (1) (85 S. E. 874).

Presumption: Where an order to sell land at administrator's sale appears to have been regularly granted, it will be presumed, in the absence of proof to the contrary, that the petition has been duly filed and presented to the court of ordinary. 141/146 (1) (80 S. E. 624).

That petition for leave to sell was sworn to on a certain date is not such evidence of the filing of the petition on that date as will overcome the presumption that it was duly filed. *Id.* 146 (2).

Reformation of deed: Fact that purchasers at an administrator's sale received a deed for a certain number of acres, more or less, and subsequent measurements showed about 30 acres less, not entitle them to a reformation of the conveyance, and recovery for the shortage in the land, where they, with full knowledge of its conditions, accepted the conveyance and paid the consideration expressed. 141/309 (1) (80 S. E. 1002).

Title: Administrator's deed, made on sale under order from ordinary, is inadmissible as muniment of title, unless accompanied by order. 141/653, 654 (3) (81 S. E. 1119).

Charge, in suit by heirs to recover lands sold by executor where purchaser set up that estate received benefit from proceeds, that if sale was necessary and price paid was value of land which was received by estate, verdict should be for purchaser, was erroneous. 144/45 (2) (85 S. E. 1054).

§ 4028. (§ 3452.) **Manner and place of sale.** Every such sale shall be advertised in any newspaper or gazette having a general circulation in the county where the property to be sold is located, once a week for four weeks after the leave granted and before the sale. It shall be had at public auction on the first Tuesday of the month between the usual hours

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of sale, and at place of public sales in the county having jurisdiction of the administration unless by special order in the discretion of the ordinary, a portion of the land is sold in another county where the land lies. But any executor, administrator, guardian, or other trustee who by law is managing any trust, estate, or fund, under the supervision of the ordinary or court of ordinary, may sell any [] (a) property situated in [] (a) this State, if upon petition the ordinary shall, in the exercise of sound discretion, deeming that it is for the best interest of cestui que trusts that said real estate be sold on the premises, shall by order entered on the minutes, so direct: Provided, that such sales shall be advertised as provided by law, and one hour's public notice of the commencement of the same shall be given at the court house door on sale day.

Acts 1863-4, p. 30. 1873, p. 30. 1851-2, p. 95. 1872, p. 32. (a) Acts 1920, p. 80. §§ 4026, 6060.

Place: Sale under order of court of ordinary other than that having jurisdiction of the administration of land situated in county, when made by an executor without special order allowing the sale to occur there, is illegal. 141/422 (1) (81 S. E. 200).

Sale of land by administrator, not had at court house of county in which land was situated, but had upon premises in another city in the same county, there being no order by the ordinary authorizing the sale upon the premises, defendant in possession having notice that necessary order had not been granted, was invalid and voidable at suit of heirs. 149/464 (1) (100 S. E. 393).

Where courthouse had been burned, and no other permanent place had been rented for court purposes, administrator's sale held at site of burned courthouse was not void for reason that after fire terms of superior court were held in public school building, under order of judge that they be held there until suitable provision had been made, it further appearing that when court was not in session building was used for school purposes, and that clerk of superior court, the ordinary, and the

sheriff had their offices in another building. 24 App. 686 (1) (101 S. E. 919).

Time: Where deed of administrator with will annexed recites that land was exposed for sale under and by virtue of order of court of ordinary, and order required that administrator "proceed in the premises as required by the statutes in such cases made and provided," deed will be held valid, although not reciting that sale took place within hours required by the statute, in absence of anything to show contrary. 149/683 (3) (102 S. E. 162).

Title: Charge in action for conversion of property purchased at administrator's sale and the ginnery thereon that if advertisement showed that land and ginnery would be sold and that property in dispute was part of ginnery then the purchaser bought the ginnery and all things affixed thereto was not erroneous. 142/391 (4) (83 S. E. 100).

Where purchaser bought understanding that he was getting the property advertised he took whatever belonged with the ginnery regardless of any private intent of the administrator. Id. 391 (7).

§ 4029. (§ 3453.) Sale divests liens.

Mortgage lien: Plaintiff here entitled to have mortgage paid from proceeds derived from administrator's sale of

mortgaged property. 140/699, 700 (4) (79 S. E. 561).

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§ 4030. (§ 3454.) **Recital in deed.**

Power: Mere recital in administrator's deed that an order to sell was granted is not sufficient to comply with requirements that the deed must show authority to sell; not essential that the order to sell or a certified copy thereof, be attached to the deed. 141/419 (2) (81 S. E. 196).

Time of sale: Where deed of administrator with will annexed recites that land

was exposed for sale under and by virtue of order of court of ordinary, and order required that administrator "proceed in the premises as required by the statutes in such cases made and provided," deed will be held valid, although not reciting that sale took place within hours required by the statute, in absence of anything to show contrary. 149/683 (3) (102 S. E. 162).

§ 4033. (§ 3457.) **Property held adversely.**

Applied. 147/657, 658 (2) (95 S. E. 238).

Common law: While this section is an exception to the general rule of force in this State since the Act of 1859 (Acts 1859, p. 24), the exception itself is a survival of the common law rule of force in the State prior to the Act of 1859; under the common law rule, a deed to land executed while the same was held in adverse possession by a third person was void for champerty. 149/276, 278 (99 S. E. 886).

Title: Purchaser at administrator's sale while land is held adversely to estate derives no title. 144/508 (87 S. E. 676).

Administrator can not lawfully sell property held adversely to estate by third person, and deed made by administrator to land when same is held

adversely to estate by third person is void. 149/276 (1) (99 S. E. 886).

Turpentine lease: Where administrator, in individual capacity and at private sale, granted turpentine lease on all turpentine timbers for stated term, on certain described lands, with right to lessee to have and to hold said leased lands for said purposes, and lessee entered and cut and boxed the timber, sale of land by administrator, without reservation of turpentine rights, while lessee was in actual and open possession, was invalid, and deed to purchaser was void in so far as it purported to convey title to turpentine timber. 149/276 (2) (99 S. E. 886).

Work: Occupation by claimant evidenced by working trees for turpentine was such adverse possession as prohibited sale of land by administrators. 143/17 (84 S. E. 59).

§ 4035. (§ 3459.) **Private sale against policy.**

Contract: In absence of authority under will executor can not grant option to purchase at private sale for specified price. 142/434 (1) (83 S. E. 105).

While executor's contract to sell realty at private sale for a specified price remains executory it can not be enforced. Id. 434 (2).

Life estate: Where will created life estate in widow of testator, with remainder to his children, and widow,

who was named as executrix, sold property of estate at private sale without order authorizing sale, her deed conveyed only the life estate, and did not divest the children of their interest in the remainder. 148/44 (2) (95 S. E. 682).

Order of court: Agreement by administrator to make private sale without order of court is violative of public policy and unenforceable. 145/616 (3) (89 S. E. 689).

§ 4036. (§ 3460.) **Sale under will.**

Manner: Where no authority for private sale of property of testator's estate was conferred by will, contract privately made in behalf of executors, by one of them, for sale of land of estate,

providing that title should be perfected, was contrary to public policy, and an action for breach of the contract was not maintainable. 22 App. 596 (96 S. E. 710).

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§ 4039. (§ 3463.) **Sale by administrator, when void and when voidable.**

Authority: Executor's deed, pursuant to sale illegal under section 4028, is insufficient to pass title. 141/422 (1) (81 S. E. 200).

Choses in action are within scope of section. 140/148, 151 (78 S. E. 938).

Eject vendee: In ejectment by remaindermen against the transferee of purchaser at invalid administrator's sale, it was not a condition precedent to recovery that plaintiffs offer to restore that part of the price received by them in ignorance of the source from which it was derived. 141/422, 424 (7) (81 S. E. 200).

Answer averring that "petitioners can not retain said purchase-money and recover said land, and they have at no time restored or offered to restore said purchase-money with interest," was insufficient as setting up an estoppel, and not good as a plea for an equitable accounting. Id. 422, 424 (7-a).

Innocent purchaser protected against nothing except irregularities in carrying out valid orders of court of ordinary granting leave to sell. 140/148, 151 (78 S. E. 938).

Second assignee of insurance policy with notice that assignment to first

assignee by administratrix was without order of court did not acquire legal title, but no recovery could be had against him if company not insolvent. Id. 148 (2).

Order of court of ordinary granting leave to administrator with will annexed to sell land represents authority for sale of real estate, and when sold to innocent purchaser, in accordance with statute, such sale divests title of heirs, although there may be irregularities. 149/683 (1) (102 S. E. 162).

Insurance policy assigned by administratrix at private sale, assignment illegal; ordinary could not validate by ex parte order. 140/141 (2) (78 S. E. 935).

Time of sale: Where deed of administrator with will annexed recites that land was exposed for sale under and by virtue of order of court of ordinary, and order required that administrator "proceed in the premises as required by the statutes in such cases made and provided," deed will be held valid, although not reciting that sale took place within hours required by the statute, in absence of anything to show contrary. 149/683 (3) (102 S. E. 162).

§ 4039 (a). **Sale to discharge debts. Petition.** [It shall be lawful, in all cases where property is left by will heretofore or hereafter made, providing for the keeping together and holding the real estate named in such will until the beneficiaries under such will shall arrive at the age of twenty-one years, and in all cases where property has been, or may hereafter be left by will providing that the property therein designated cannot be sold until the happening of some contingency, which contingency relates to the future, and when such estate owes debts, whether such indebtedness was owing at the death of the maker of such will, or has been lawfully contracted by the executor, administrator, or trustee of said estate, and there is not sufficient personal belongings to such estate to pay off and discharge said indebtedness, for the executor, administrator, or trustee, as the case may be, of such estate to sell at private or public sale a sufficiency of the real estate belonging to such estate to pay off and discharge any such debts or liabilities of such estate, and to make to the purchaser or purchasers in her, or his, official capacity as such executor, administrator, or trustee, good and sufficient title in fee simple to the property so sold, and to apply the proceeds of such sale, or sales, so made,

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or so much thereof as is necessary, to the extinguishment of such indebtedness of said estate, and such executor, administrator or trustee, as the case may be, is hereby authorized to make such sale for the purpose aforesaid: Provided, however, that before any such sale shall be finally consummated such executor, administrator or trustee shall file in the office of the clerk of the superior court of the county where such administration is being had, a petition in writing addressed to the judge of the superior court of such county where such administration is being had, setting forth fully and in detail the amount of such indebtedness which is sought to be paid, to whom same is due, when contracted, by whom contracted, the rate of interest being paid, when such indebtedness will be due, whether such indebtedness, or any part thereof, is secured by deed, mortgage, or other lien on any property belonging to such estate, stating the amount of secured debt, or debts, how secured, date same was contracted, to whom due, when due, rate of interest, and disposition of the property so encumbered by security deed, mortgage, or other contractual lien, and if judgment is outstanding against said estate it shall be fully stated in the petition, the name of the plaintiff, the amount of the judgment, or judgments, the date, or dates, of same, from what court issued, with the full amount due on such judgment or judgments.]

Acts 1920, pp. 245, 246.

§ 4039 (b). **Sections 3064 and 3065 applied.** [In all other respects than as set out and provided in section 4039 (a), all such sales as are provided for in section 4039 (a) shall be made as provided in sections 3064 and 3065, providing for sales for re-investment by guardian; [all] such sales to be approved and confirmed by said judge by appropriate order, and the entire proceedings shall be recorded on the minutes of the superior court, and properly indexed.]

Acts 1920, p. 247.

SECTION 8.

Of Distribution, Advancements, and Year's Support.

§ 4040. (§ 3464.) Rules of distribution.

Charge: Though charge that administrator might recover even though demand sued upon had been set apart as year's support may have been erroneous, error was harmless where evidence demanded finding that debt in question was not set apart as year's support. 23 App. 682 (2) (99 S. E. 136).

Debts: Administrator is entitled to retain share of an heir, in money derived from sale of realty belonging to

decedent's estate, in payment of debt which heir owes to the estate, as against, and in preference to, claim of assignee or purchaser from the heir. 20 App. 381 (1) (93 S. E. 55).

Evidence tending to show that there were seven legatees entitled to estate, verdict in favor of three for full amount of cotton left by testator, certain rents, etc., was contrary to evidence. 140/386 (78 S. E. 844).

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Non-resident distributee of estate sued could not be made party so that personal judgment could be obtained against her on account of distributions improperly made. 144/35 (1) (85 S. E. 999).

Petition alleging that plaintiff had been

in testator's service for 10 years previous to his death was insufficient to show right to recover sum bequeathed to employees in testator's service for 10 years, "up to and next preceding my death." 143/23 (84 S. E. 68).

§ 4041. (§ 3465.) **Year's support to family.**

Agreement between widow and children that land should be set apart for year's support upon making specified payments to children was binding on all adult parties. 148/157 (96 S. E. 178).

Amount: Charge that the question is simply what is a reasonable amount to be set aside out of the estate to maintain widow in same manner in which she was maintained, according to her circumstances and standing in life, was not erroneous. 19 App. 551 (2) (91 S. E. 900).

Special circumstances occurring and existing during first year after death of head of family, and illustrating amount necessary for support of widow, should be considered by the jury. 19 App. 551 (2) (91 S. E. 900).

Whole amount allowed widow should be sufficient to maintain and support her, including necessary medical service, in keeping with circumstances and standing of family previous to death of husband, due regard being had to solvency of estate. 19 App. 551 (2) (91 S. E. 900).

Debts: Where no proceeding had been brought to reduce decedent's debt to judgment, property set aside for year's support for decedent's widow and child could not be subjected to such debt. 143/703 (1) (86 S. E. 780).

Description: Proceedings to set apart year's support were invalid for want of sufficient description of what was sought to be set apart, where it contained no more definite description than "95 acres of land valued at \$250," and did not purport to set aside decedent's entire estate. 144/231 (3) (86 S. E. 1089).

Insufficiency of description was not curable by parol evidence that widow took and held possession of certain property alleged to be land attempted to be set apart. *Id.* 231, 232 (4).

Division: Where intestate left widow and three adult children by a former marriage, who informed stepmother of her right to year's support, etc., and suggested friendly division of property and they relied on her promise to let them know her decision, she was bound to advise them of her decision. 147/609 (2) (95 S. E. 4).

Evidence: Under evidence and law applicable to the issue involved here widow and children of decedent were not entitled to fund in controversy as year's support. 140/250 (78 S. E. 833).

Exchange of land: Widow, pending minority of children, may after her remarriage exchange land set apart for year's support for other land, purpose being to provide support for herself and minor children, and in absence of duress or fraud if property received by widow turns out to be bad investment, that will not furnish cause of action for widow and children to recover land exchanged from remote grantee. 146/803 (1) (92 S. E. 517).

Execution: Under this section and section 4044 dismissal of claim, instead of letting case proceed to verdict subjecting property, furnished no cause of complaint on behalf of claimant, 144/192 (86 S. E. 537).

Fraud: Where widow, in violation of agreement with her stepchildren, procured ordinary to set apart whole of estate for year's support, court of equity, on timely application, would set aside judgment for fraud, where stepchildren had no actual knowledge of proceeding before final judgment and estate was undervalued and judgment was grossly excessive. 147/609, 610 (3) (95 S. E. 4).

Insolvent or solvent estate: Where appraisers have made their return setting apart specified property for widow, and caveat is filed by creditor, solvency or insolvency of estate may

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properly be taken into consideration. 146/252, 253 (1-b) (91 S. E. 34).

Judgment: Where attorney of record for widow claimed interest in fl. fa. against estate of deceased husband, based on judgment for year's support, and levied it on land, evidence was sufficient to show that claim, with consent of attorney, had been settled by conveyance of certain lands in full discharge of such judgment. 141/612 (1) (81 S. E. 870).

Receipt of widow, acquitting claimants as heirs at law of her husband's estate of all liability on judgment for year's support, was competent evidence. *Id.* 612 (3).

Where, upon petition of widow, year's support, consisting in part of lot of land, was set apart for widow and minor children, and where, upon petition of widow acting for herself and children, return of appraisers, so far as it related to such land, was amended by making description more definite, which amendment was made judgment of court of ordinary, minor children were bound. 148/628 (1) (97 S. E. 681).

Minor child: Where minor child was sole heir at law of her father, taking title immediately to land owned by him, her title was not divested by any valid year's support set apart in the land, proceedings relating to year's support not being in conformity with sections 4041 and 4043. 148/621, 622 (1) (97 S. E. 668).

Non-resident: Where owner of land is a non-resident at time of his death, his widow, though non-resident at time of her application, may apply to have year's support set apart. 142/127 (2) (82 S. E. 445).

Notice required of application for year's support and return of appraisers is for benefit of persons whose interests are adversely affected by the judgment, and not for the widow and minors, for

whose benefit judgment is rendered. 148/164, 166 (96 S. E. 180).

Neither the widow nor the minor children can complain that others do not have proper notice. *Id.*

Priority of year's support: See § 4000 (1) and notes.

Separation: Fact that time of death of decedent his wife had for number of years been living in state of separation from him would not bar her as widow from claiming benefit of this section. 146/252, 253 (1-c) (91 S. E. 34).

Setting aside: Petition in action to set aside judgment granting year's support and to recover land set apart to plaintiff's mother by agreement, which she afterwards conveyed to defendant, not subject to general demurrer. 144/143, 144 (1) (86 S. E. 321).

Sustaining demurrer to certain allegations of petition did not require dismissal, where petition as whole was not subject to general demurrer. *Id.* 143, 144 (3).

Delay of 11 years in bringing suit was not laches barring the action. *Id.* 143, 144 (4).

In proceeding to set apart year's support for widow and minor children out of property of deceased husband, widow may act for minor children as well as herself. 148/164, 165 (96 S. E. 180).

Testacy or intestacy: Widow is entitled to year's support whether husband dies testate or intestate. 146/734 (1) (92 S. E. 204).

Title: Where title to property was not vested in decedent at time of his death, it could not be set aside as year's support for his widow and minor children. 22 App. 93 (1) (95 S. E. 316).

Will: Widow is entitled to year's support out of estate of her deceased husband, notwithstanding fact that he left will giving to her life estate in all his property, real and personal. 21 App. 545 (1) (94 S. E. 853).

§ 4043. (§ 3467.) **Return of appraisers.** The appraisers shall make a schedule of the property, or statement of the amount of money set apart by them, and return the same under their hands and seals to the ordinary within thirty days from the date of their appointment: [where any lands shall be included in the property set apart and assigned as a year's sup-

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port, and the appraisers so appointed in their return shall fully and accurately describe said land, and make a plat thereof, and they shall have power to procure the aid of the county surveyor of the county, or other competent surveyor, in making the survey and admeasurement of the lands so set apart, who shall be required to make a careful plat of the lands so set apart showing the lengths of the boundary lines (except crooked natural boundaries), and the directions in which they run, and setting out all original lines and natural boundaries, so as to definitely and accurately describe the lands so set apart, which plat shall be made and recorded as a part of the appraisers' return;] (a) upon filing said return, the ordinary shall issue citation and publish notice as required in the appointment of permanent administrators, citing all persons concerned to show cause why said application for twelve months' support should not be granted; and if no objection is made after the publication of said notice for four weeks, or, if made, is disallowed, the ordinary shall record the return so made in a book to be kept for this purpose; if an appeal be taken, pending the appeal the family shall be furnished with necessities by the representative of the estate.

Acts 1884-5, p. 49. (a) Acts 1918, p. 122.

Amendment: Intimation of intention to dismiss caveat to appraisers' report made on application for year's support, and motion to dismiss, did not deprive caveators of right to amend. 142/290 (1) (82 S. E. 892).

Where judgment of court of ordinary allowing amendment to return of appraisers who set apart year's support was binding upon minor children who petitioned, verdict in favor of defendant in suit by minors for three-fourths undivided interest in lot of land set apart was required, and court did not err in so directing. 148/628 (2) (97 S. E. 681).

Burden of proof was upon assignee of adult children of decedent who filed objection to return of appraisers. 142/127 (1) (82 S. E. 445).

Burden of proof is on objector, on trial of issue formed by objections filed by creditor of decedent to return of appraisers setting apart year's support to widow and minor children. 19 App. 510 (1) (91 S. E. 901).

Burden of proof is on objectors on trial of issue formed by objections of adult children of decedent to return of appraisers, setting apart year's support to the widow. 19 App. 551 (1) (91 S. E. 900).

Charge that it was duty of jury to determine whether or not objection filed was good, in other words, whether or not report was correct, was without merit, where court expressly charged that report of appraisers, fixing amount of support was prima facie correct, and burden was upon objectors to show that amount found by appraisers was in fact excessive. 19 App. 551 (2) (91 S. E. 900).

Charge, on trial of issue formed by objections filed by creditor of decedent to return of appraisers setting apart year's support, "You have nothing on the face of this earth to do with any judgment of any court in the world; this is a new proceeding, and it is for you to pass on, regardless of what has been done with it anywhere else," was error. 19 App. 510 (2) (91 S. E. 901).

Description: Return of appraisers appointed to set apart a year's support to a widow and minor child held not void for uncertainty in the description of the land, and extraneous evidence was admissible to apply the description to the subject-matter. 141/61 (2) (80 S. E. 322).

Judgment setting apart year's support is in effect conveyance to widow of an interest in her deceased hus-

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band's estate, and description of property must be such as to render it capable of identification; certainty of description required in deed is required in judgment setting apart year's support; if description is so vague and indefinite that property can not be identified, title of estate is not divested by judgment. 20 App. 815 (1) (93 S. E. 497).

If description in judgment setting apart year's support is so imperfect and indefinite that land can not be identified, and if there is nothing in pleadings to aid description, judgment is void, and cannot be amended at instance of grantee of widow by addition of descriptive terms. 20 App. 815 (2) (93 S. E. 497).

In absence of aid from the application, return of appraisers, or judgment setting apart year's support, order setting apart "50 acres, more or less, of lot of land number 383 in the Second Land District of Appling County, Georgia," is void, and grantee of widow can not create a title in the applicant by amending the judgment. 20 App. 815 (2) (93 S. E. 497).

Evidence: It was not erroneous, in proceeding to establish title under deed alleged to have been executed by deceased, where widow set up title under allotment as year's support, to admit in evidence certified copies of record from court of ordinary describing land as specified number of acres of given lots; official map showing lots consisted of that number of acres. 146/513 (1) (91 S. E. 771).

It was not error, in claim case, to admit in evidence judgment of the court of ordinary setting apart land in issue as year's support for widow and her minor children, upon objection raised in collateral attack, averring that judgment was void because of its terms year's support was subject to claim of creditor. 146/685, 686 (2) (92 S. E. 217).

Judgment: Where no objections are filed

to return of commissioners appointed to assign widow and minor children year's support, such return does not become effective as judgment until recorded. 143/425 (85 S. E. 324).

Long lapse of time between death of husband and application of widow for year's support, setting apart of previous year's support, and parol partition of land of husband by his heirs at law with consent of widow, are matters to be addressed to ordinary before final judgment setting apart to widow year's support, and can not, in another and different court, be made basis of collateral attack on judgment. 147/387 (1) (94 S. E. 236).

Every presumption is in favor of judgment of ordinary setting apart year's support, and it is not subject to collateral attack except where record discloses want of jurisdictional facts. 147/387 (1) (94 S. E. 236).

Minor child: Where minor child was sole heir at law of her father, taking title immediately to land owned by him, her title was not divested by any valid year's support set apart in the land, proceedings relating to year's support not being in conformity with sections 4041 and 4043. 148/621, 622 (1) (97 S. E. 668).

Nunc pro tunc entry: Party relying on proof of return of commissioners to set aside year's support should, if he has such return, take nunc pro tunc order admitting same to record, and thus render return as shown by record competent evidence. 143/425 (85 S. E. 324).

Record: Where party claiming title to land derived from widow, to whom it was set apart as a year's support, seeks to defend as against administrator by showing legal setting apart, this should be shown by the record. 143/425 (85 S. E. 324).

Admission in evidence of order granted by ordinary at chambers correcting record of return of appraisers was error. *Id.*

§ 4044. (§ 3468.) Title to property set apart.

Debt: Personal property set apart jointly to widow and her minor children as year's support can not be subjected to payment of judgment for debt con-

tracted by widow individually, in consideration of which it did not appear that minors had any interest. 20 App. 818 (1) (93 S. E. 559).

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Where execution was levied on property set apart as year's support for joint use of widow and her minor children to satisfy judgment against widow alone, it was not error to repeal as evidence original statement of account against the defendant, such statement being irrelevant. 20 App. 818 (1-b) (93 S. E. 559).

Evidence: Rejection of evidence offered by plaintiff, husband and sole heir of child of a decedent, tending to establish parol division of land by children of such decedent, and consent and acquiescence of widow to such partition, but in no respect impeaching bona fides of purchaser, under judgment of ordinary setting apart the land for year's support, was harmless. 147/387, 388 (4) (94 S. E. 236).

In action to recover property set apart to widow for year's support, in view of testimony of plaintiff as to consideration paid by defendant, who bought from one who first purchased from widow, erroneous admission of evidence relating to property and transaction was harmless. 147/789, 790 (2) (95 S. E. 696).

Execution: Under this section and section 4041 dismissal of claim, instead of letting case proceed to verdict subjecting property, furnished no cause of complaint on behalf of claimant. 144/192 (86 S. E. 537).

Joint use: Title to personal property set apart jointly to widow and her minor children was vested in them for their joint use and benefit, and was not subject to partition among the beneficiaries of the year's support, nor could division thereof be compelled, so long as beneficiary existed and still occupied that relation. 20 App. 818 (1) (93 S. E. 559).

Priorities: Title of defendant widow under judgment granting year's support was subservient to title of plaintiffs under bill of sale executed by defendant's husband to secure note given as collateral for advancements for farm supplies and bill of sale by

widow to secured advances. 144/118 (2) (86 S. E. 219).

Sale: Where land is set apart as year's support to widow and minor children, after children become of age and leave the land, widow may sell all or portion for her support or for services of attendant and nurse, or she may convey directly to persons rendering services. 144/698 (1) (87 S. E. 1023).

Where land belonging to estate is set apart as year's support to decedent's widow and minor children, widow may sell and convey it for purpose of maintenance and support of herself and children, or, if children are of age and have left the land, for support of herself; sale and conveyance by widow divests title of children as heirs of decedent, and also their claim upon land as beneficiaries under allowance of year's support. 146/684 (1) (92 S. E. 218).

Where widow and children agreed to parol division of land, and widow, after being in possession for 38 years, applied for year's support, purchaser of land set apart to her by regular judgment in bona fide possession without notice of partition had legal title superior to that of children or their heirs at law. 147/387, 388 (3) (94 S. E. 236).

Where widow sold property set apart as year's support for purpose other than support of herself and children, and purchaser sold land to third persons who were without notice that property had been sold for unauthorized purpose, purchaser, being without notice, acquired legal title as against widow and children, and one of the children, who in meantime had attained majority, could not recover land in action against last purchaser. 147/789 (1) (95 S. E. 696).

Widow can lawfully sell property set apart when necessary for support of family. 148/164, 166 (96 S. E. 180).

Time: Title to property set aside was in widow and minor children from time return of appraisers was made to court of ordinary. 148/164, 166 (96 S. E. 180).

§ 4045. (§ 3469.) Provision in lieu of year's support.

Will: In case of testacy, in order to put widow to election between provisions

in her favor in will and her right to year's support, such testamentary pro-

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vision must be either expressly made in lieu of year's support, or intention of testator to that effect must be deduced by clear and manifest implication from will, founded on fact that

claim of year's support would be inconsistent with will or so repugnant to its provisions as necessarily to defeat them. 146/734 (1) (92 S. E. 204).

§ 4047. (§ 3471.) Fees and costs.

Amount: Where to report of appraisers to set apart year's support to widow caveat on ground of excessiveness is filed, and appeal taken from court of ordinary to superior court, where

amount awarded by jury is less than allowed by ordinary, costs of entire proceeding should be assessed against applicant. 146/734, 735 (2) (92 S. E. 204).

§ 4049. Inferior to personalty mortgage.

Funeral expenses: In payment of debts of decedent, lien on personal property, evidenced by purchase-money mortgage which expressly states that it is executed and delivered for purpose of se-

curing debt for such purchase-money, is inferior to lien for expenses of decedent's funeral. 20 App. 328 (93 S. E. 28).

§ 4052. (§ 3474.) Advancements.

Deed conveying lands from father to son as trustee for son's children, in consideration of parental affection and certain sum of money paid to father annually during his life as support for himself and wife, will operate as advancement to son from father, if so intended by father and so accepted by son. 147/432 (1) (94 S. E. 543).

Injunction: Where court of ordinary was proceeding to have estate of in-

testate duly administered, and it did not appear that the administrator's bond would not fully protect interest of heirs, equity would not enjoin the administrator from proceeding to sell or dispose of land, or from administering and distributing its proceeds, in view of rights under sections 4026, 4052, 4055, 4057 et seq. 149/176, 181, 182 (99 S. E. 624).

§ 4055. (§ 3477.) Advancements, how accounted for.

Injunction: Where court of ordinary was proceeding to have estate of intestate duly administered, and it did not appear that the administrator's bond would not fully protect interest of heirs, equity would not enjoin the

administrator from proceeding to sell or dispose of land, or from administering and distributing its proceeds, in view of rights under sections 4026, 4052, 4055, 4057 et seq. 149/176, 181, 182 (99 S. E. 624).

§ 4056. (§ 3478.) How estimated.

Value of estate at time of first distribution is proper criterion for arriving at rights of heirs at law though one heir may have received advancement. 142/487, 488 (4) (83 S. E. 115).

Before heir can claim any part of estate he must account for advancements made to him, at their value when made. *Id.*

Charge that value of both the advancements and remainder of estate

should be estimated at time advancements were made was erroneous. *Id.*

Where decedent died intestate, leaving widow and two children, to one of whom he had made advancements, fact that widow may have conveyed her interest to children did not abrogate rules as to time for estimating value of general estate and of advancements in partition between the children. *Id.* 487, 488 (5).

Of commissions and extra compensation, and expense of giving bond.

§ 4057. (§ 3479.) **Division in kind, how made.**

Deed: Where decedent died intestate, leaving widow and two children, fact that warranty deed to widow's interest was accepted by the children, or by one of them, did not prevent partitioning of estate as a whole. 142/487, 488 (5) (83 S. E. 115).

Injunction: Where court of ordinary was proceeding to have estate of intestate duly administered, and it did not appear that the administrator's bond would not fully protect interest of heirs, equity would not enjoin the administrator from proceeding to sell or dispose of land, or from administering and distributing its proceeds, in view of rights under sections 4026, 4052, 4055, 4057 et seq. 149/176, 181, 182 (99 S. E. 624).

Petition: Where petition in partition by widow and her children fails to allege that there had been no administration of the estate, but evidence of that fact was introduced without objection, recovery by plaintiffs could not be set

aside because of such failure. 141/629, 630 (3) (81 S. E. 895).

Guardian's suit on behalf of wards against a former ward to set aside award of property in proceeding for division in kind, in which no fraud or notice of claim of irregularity in proceedings was alleged against purchasers or mortgagees, was properly dismissed on demurrer. 146/482 (91 S. E. 542).

Presumption: Where freeholders made return to ordinary, dividing property in kind between heirs and distributees, and recitals indicate that application was made to ordinary for division in kind and that estate was in process of being administered, there is presumption that proper application was made; and on trial of ejectment suit wherein heir is plaintiff, involving title to land awarded, it is not error to admit in evidence certified copy of return dividing the property. 146/310 (2) (91 S. E. 104).

§ 4058. (§ 3480.) **Order for partition, etc.**

Cited and applied. 143/756, 758 (85 S. E. 917).

Operation and effect: Partition of testator's land under judgment in action by his administrator de bonis non

with will annexed against legatees and devisees was effective as division in severalty of all estate accruing to parties thereto. 142/41 (3) (82 S. E. 456).

§ 4059. (§ 3481.) **Return of appraisers.**

Record: Judgment of confirmation is prerequisite to record of return of partitioners dividing decedent's realty,

pursuant to order of ordinary under this and the next following sections. 143/756 (2) (85 S. E. 917).

SECTION 9.

Of Commissions and Extra Compensation, and Expense of Giving Bond.

§ 4062. (§ 3484.) **Ordinary commissions.**

Application: In equitable suit by legatees against executors for accounting, it is competent for executors to be decreed allowance for commissions to which they would be entitled under this section, and also to reasonable compensation to which they might be entitled under section 4065, notwithstanding no application has been al-

lowed therefor in court of ordinary. 146/525 (4) (91 S. E. 780).

Contract: Executor's statement to attorney for beneficiaries of estate that he did not expect to charge commissions on final accounting was not binding contract, when without consideration and not acted upon. 141/727, 729 (4) (82 S. E. 451).

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Costs: Commissions are regarded as costs, and not as part of distributive share of heir who is also administrator of estate; hence, application of commissions to personal use of administrator does not work inequality in distribution of estate. 20 App. 381 (5) (93 S. E. 55).

Executor: Where one as legatee receives amount in cash paid upon check signed jointly by himself as executor and by his co-executor, latter is entitled to his proportion of usual fees for disbursing money to legatees. 145/146 (88 S. E. 566).

Federal Employers' Liability Act: Administrator is not entitled to commissions on recovery for death of servant under Federal Employers' Liability Act. 144/38 (2) (85 S. E. 1013).

Guardian: Where guardian receives and disburses estate of ward, he is entitled to statutory commissions, unless

he forfeits them on grounds provided by law, and in accounting between guardian and ward, such commissions may be charged against corpus of estate as well as the income. 149/404, 405 (2) (100 S. E. 362).

Individual indebtedness: Where executor made payments on his individual indebtedness to estate after same had been established by decree denying him right to any commission, he was precluded from charging commissions after decree. 141/727, 730 (7) (82 S. E. 451).

Commissions earned by administrator or personal representative of estate are part of necessary expenses of administration, and, in settlement with heirs, administrator is not chargeable with failure to apply his commissions to debt due by him to estate, regardless of insolvency of administrator. 20 App. 381 (4) (93 S. E. 55).

§ 4065. (§ 3487.) **None for delivering property in kind.**

Application: In equitable suit by legatees against executors, for accounting, it is competent for executors to be decreed allowance for commissions to which they would be entitled under section 4062, and also to reasonable

compensation to which they might be entitled under this section, notwithstanding no application has been allowed therefor in court of ordinary. 146/525 (4) (91 S. E. 780).

§ 4067. (§ 3489.) **Extra compensation.**

Burden: Where order allowing executors extra commission is alleged to be unauthorized by evidence, burden is on attacking party to show that it was improperly made. 146/525 (5) (91 S. E. 780).

Presumption: Where it appears that or-

dinary has formally allowed executors extra compensation, such allowance being within jurisdiction of ordinary, it will be presumed that he had before him sufficient evidence upon which to base his order. 146/525 (5) (91 S. E. 780).

§ 4069. (§ 3491.) **Forfeiture of commissions.**

Guardians: Where guardian receives and disburses estate of ward, he is entitled to statutory commission, unless he forfeits them on grounds provided by law, and in accounting between guardian

and ward, such commissions may be charged against corpus of estate as well as the income. 149/404, 405 (2) (100 S. E. 362).

SECTION 10.

Of Final Settlements and Receipts.

§ 4073. (§ 3493.) **Settlement before the ordinary.**

Cited and applied. 145/660, 662 (89 S. E. 746).

Adverse title: Stranger to proceedings citing administrator to settlement of

Of final settlements and receipts.

accounts can not set up adverse title to property sold by administrator and claim proceeds from its sale. 142/257 (1) (82 S. E. 651).

Amendment to administrator's answer, alleging that certain person was entitled to fund derived from sale of property, without alleging that such person was creditor of the estate, was properly stricken. 142/257 (2) (82 S. E. 651).

Refusal to allow amendment, which raises no issue included in the citation, is not ground for new trial. *Id.* 257 (3).

Appeal: Error to dismiss appeal from judgment that certain person was decedent's only heir, on ground that appellants were apparently mere strangers to the case, where they described themselves as adverse claimants to such person. 143/325 (85 S. E. 102).

Citation is all the pleading necessary in proceeding against administrator for accounting. 142/257 (3) (82 S. E. 651).

This section does not contemplate that after administrator has cited all distributees to be presented at settlement of his accounts, and after distributees have appeared and one of them has filed objections to accounting, objecting distributee shall then have additional right of citing administrator to appear for settlement. 24 App. 476 (101 S. E. 193).

Evidence: Judgment of court of ordinary setting apart year's support, offered, not for protection of temporary administrator in turning property over to widow, but for his protection in paying out proceeds of crops in payment of rent and expenses to complete crop and supplies furnished to intestate, was irrelevant in action against temporary administrator for accounting. 145/534 (2) (89 S. E. 618).

Judgment: Judgment of court of ordinary, discharging temporary administrator, reciting that he had admin-

istered estate in accordance with agreement in writing would not be conclusive on permanent administrator suing temporary administrator for accounting as to personalty. 145/534 (3) (89 S. E. 618).

Where upon citation for settlement judgment was rendered against administratrix and in favor of distributee of estate, such judgment was binding and conclusive upon administratrix, but not upon sureties upon her bond, who might show that judgment was obtained by collusion and fraud and that administratrix had lawfully paid over distributee's share of estate. 147/711 (1) (95 S. E. 251).

Jurisdiction: While under sections 4073 and 4074 ordinary has same jurisdiction and power as court of equity to compel administrator to account to distributee, concurrent jurisdiction of equity over settlement of accounts of administrators is expressly retained by section 4075. 147/494 (1) (94 S. E. 766).

Time: Equitable action against executors for final accounting was premature when instituted by legatee before expiration of 12 months from time judgment of Supreme Court is made judgment of trial court. 144/55 (1) (86 S. E. 245).

Equitable action brought in 1917 upon administrator's bond, against sureties alone, in which petition alleged that married woman died intestate, leaving her husband sole heir at law, that in 1885 administrator was appointed, who gave bond with two sureties, that in 1887 administrator sold certain land, proceeds from which were never reported or paid over to the heir, that the administrator died and there was no administration upon his estate that the administrator came into possession of such money, was barred by limitations. 148/307 (96 S. E. 568).

§ 4074. (§ 3494.) **How made and enforced.**

Collateral attack: Judgment of ordinary against administrator and sureties, on citation for settlement, can not be collaterally attacked by the sureties, or by the administrator, in answer to suit

by the ordinary, for use of heirs at law of decedent. 146/290, 291 (1-c) (91 S. E. 50).

Jurisdiction: While under sections 4073 and 4074 ordinary has same jurisdic-

Suits against executors, administrators, and sureties.

tion and power as court of equity to compel administrator to account to distributee, concurrent jurisdiction of equity over settlement of accounts of

administrators is expressly retained by section 4075. 147/494 (1) (94 S. E. 766).

§ 4075. (§ 3495.) **Settlement in court of equity.**

Applied. 147/739 (95 S. E. 231).

Evidence: It was not error, in proceeding against administrator for accounting and distribution, to admit in evidence paper writing whereby one heir conveyed his interest to his mother. 146/204, 205 (3) (91 S. E. 22).

Where petition in suit by distributees against administrator for accounting and settlement alleged that defendant had completely dominated intestate and by fraud and undue influence had obtained money from her, evidence that he influenced intestate's general conduct by threats and acts of violence, etc., was admissible. 147/494, 495 (6) (94 S. E. 766).

Garnishment: Where son to whom testator had bequeathed and devised property could not enforce payment to him of any portion of the income of the estate, except in equitable suit seeking accounting and ascertainment of

amount due him, creditor could not recover by garnishment against the executrix named as garnishee. 147/386 (94 S. E. 303).

Ordinary: Jurisdiction and power of ordinary is as broad as that of court of equity in settlement of estate. 20 App. 381, 382 (6) (93 S. E. 55).

Remedy: Petition in suit in equity by distributee against administrator for accounting and settlement, which alleged that administrator fraudulently concealed the assets, had refused to account for petitioner's distributive share, and had appropriated certain moneys to his personal use, was not demurrable on ground that petitioner had complete and adequate remedy at law, that cause of action was barred by limitations, and that there was non-joinder of parties defendant. 147/494 (4) (94 S. E. 766).

§ 4076. (§ 3496.) **Rule for charging interest.**

Time: Where there was no admission by administrator and no evidence to show when stated amount was received by

him, it was error for court to direct jury to find interest from March 10, 1906. 22 App. 738 (3) (97 S. E. 261).

§ 4077. (§ 3497.) **Basis of settlement.**

2.

Cited and applied. 145/660, 662 (89 S. E. 746).

SECTION 11.

Suits Against Executors, Administrators, and Sureties.§ 4082. (§ 3502.) **Principal failing to settle with legatee, etc.**

Action on bond: This section does not prevent bringing of suit on administrator's bond in name of ordinary

for use of distributee. 143/764 (85 S. E. 914).

§ 4083. (§ 3503.) **When sureties may be sued in the first instance.**

Cited. 18 App. 369, 377 (89 S. E. 461).

Judgments against administrators.

SECTION 13.

Judgments Against Administrators.

§ 4088. (§ 3508.) Judgments against executors and administrators.

Amendment: Judgment in favor of creditor of intestate against administrator should be *de bonis testatoris*; when not so drawn, it is amendable on motion, and exception based on judgment is likewise amendable so as to make it conform to judgment. 148/551 (3) (97 S. E. 541).

Assets: General rule is that judgment *de bonis testatoris* against administrator who failed to plead want of assets is, at law, conclusive upon him of sufficiency of assets to pay debt upon which that judgment was rendered; failure to know real condition of estate, when by exercise of due diligence administrator might and ought to have known of it, will not suffice as excuse for not filing proper plea at right time. 18 App. 384, 385 (2) (89 S. E. 431).

Judgment against administrator, in action on alleged debt of intestate, when defendant has failed to plead want of assets, is conclusive as to question of sufficiency of assets to pay the debt; as to surety upon administrator's bond, judgment is not conclusive upon such question, but is *prima facie* evidence only, and when sued upon the bond the surety may plead and prove to deficiency of assets in the hands of of his principal liable to payment of the debt. 21 App. 39 (1) (93 S. E. 498).

Bond: No defense in action on bond given in suit in which enforcement of judgment against principal individually was enjoined that bond was improperly drafted, so as to bind principal individually instead of as executor. 142/297 (2) (82 S. E. 902). See 144/211 (1) (86 S. E. 1097).

In such case will under which defendant was executor was properly excluded as irrelevant. *Id.* 297, 298 (4).

Collateral attack: Where judgment *de bonis testatoris* has been obtained against administrator, and execution has been issued thereon, and return of *nulla bona* made, judgment can not be collaterally attacked in defense to suit thereon against administrator

personally, in which *devastavit* is alleged. 18 App. 384 (1) (89 S. E. 431).

Collection: Judgment entered against administratrix without providing for collection out of intestate's property was irregular and amendable and not void, where rights of third persons were not affected. 143/703, 704 (5) (85 S. E. 830).

Estoppel: Recovery on judgment against executor individually of certain moneys from estate, did not estop plaintiff from enforcing judgment against executor. 142/297 (1) (82 S. E. 902).

Evidence: In suit against sureties on bond of administrator, *prima facie* proof of *devastavit* may be made by introducing in evidence the judgment against the administrator, and showing by proper entries upon execution issued thereon that there is no property upon which to levy. 21 App. 39 (2) (93 S. E. 498).

Execution: Where execution commands officers to levy on goods and lands of certain person, "admr. estate of" named person, it does not authorize levy on property of decedent. 145/514 (89 S. E. 426).

Individual judgment: Non-resident executors can not be made parties in their personal capacity so that judgments for improper distribution may be recovered, notwithstanding they filed petition setting up equitable advances. 144/35 (1) (85 S. E. 999).

Lien: Administrator's individual property is not subject to lien of judgment *de bonis testatoris*, rendered against him in his representative character. 141/501 (81 S. E. 128).

Notice: Where judgment which is foundation of suit appears to have been obtained, not against administrator, but against decedent in his lifetime, against whom execution had issued, and where it appears that first notice received by administrator as to claim was more than two years after his qualification as such, and nothing

Of letters of dismission and resignation.

is shown to indicate that funds coming into his hand were not disbursed according to law, or that waste was

committed, it was not error to grant nonsuit. 21 App. 39 (3) (93 S. E. 498).

SECTION 14.

Of Letters of Dismission and Resignation.

§ 4089. (§ 3509.) Dismission, how granted.

Cited. 143/572, 579 (87 S. E. 760).

Burden of proof: Where petition has been filed by executor for order discharging him, burden rested upon caveator to sustain by proof her affir-

mation that the estate had not been fully administered, and that because of certain facts alleged petitioner was not entitled to discharge. 21 App. 95 (2) (94 S. E. 266).

§ 4090. (§ 3510.) Duty of ordinary.

Cited. 143/572, 579 (87 S. E. 760).

§ 4091. (§ 3511.) Fraudulent discharge void.

Collateral attack: As general rule, judgment of court of competent jurisdiction can not be collaterally attacked for fraud; this section makes exception in case of judgment of discharge procured by administrator by fraud practiced on the heirs or the ordinary. 146/146 (1) (90 S. E. 853).

Garnishment: Where administrator after being garnished fraudulently procured discharge, petition by judgment creditor to set aside judgment of discharge as procured by fraud without his knowledge was not subject to general demurrer. 143/572, 573 (4) (85 S. E. 760).

Parties: Judgment creditor which had garnished administrator had such interest as authorized it to move to set aside discharge of administrator as procured by fraud. 143/572, 573 (3) (85 S. E. 760).

Pleading: Where plaintiff in suit on administrator's bond alleges administrator's discharge, in order to escape effect of that judgment on ground that it was procured by fraud he must further allege facts upon which charge of fraud is based. 146/146 (2) (90 S. E. 853).

§ 4094. (§ 3514.) May not sell during life of widow.

Debts: Charge that all property belonging to deceased husband's estate and subject to his debts must be exhausted before administrator could be authorized to sell reversionary interest in dower lands to pay debts, was erroneous, as not complying with statute. 144/587 (1) (87 S. E. 799).

Where upon application by administrator order was granted by court of ordinary authorizing sale of reversionary interest in lands in which dower had been assigned, application representing sale to be necessary to pay debts, and sale was made, order will not be set aside, so as to render void

the sale, in suit by heirs, when no usual steps were taken in court of ordinary and nothing was done by administrator to prevent their urging as grounds of caveat, objection that sale of realty was not necessary for payment of debts. 147/610 (1) (95 S. E. 3).

Widow: Where intestate's widow was allotted dower in one-third of lot of land, and purchased at administrator's sale of the lot, subject to dower, and received deed purporting to convey fee simple of whole lot, she took fee in entire lot subject to her dower estate. 146/752 (92 S. E. 281).

Of removing proceedings to another county; of foreign administrators.

SECTION 15.

Of Removing Proceedings to Another County.

§ 4096. (§ 3516.) Proceedings to remove trust to another county.

General Note.

Release: Where sureties on bond held particular fund to secure them until new bond with different sureties had been given, first sureties were re-

leased and were not liable for subsequent conversion of fund paid over by them to administratrix. 16 App. 729 (86 S. E. 46).

§ 4100. (§ 3520.) Sureties, how liable.

Release: Where sureties on bond held particular fund to secure them until new bond with different sureties had been given, first sureties were released

and were not liable for subsequent conversion of fund paid over by them to administratrix. 16 App. 729 (86 S. E. 46).

SECTION 16.

Of Foreign Administrators.

§ 4101. (§ 3521.) Privileges in this State.

Cited. 18 App. 544, 557 (90 S. E. 94).

Party: When plaintiff in action pending in court in this State dies intestate in another State, where he is domiciled, and administratrix is appointed in county of his demise, such administratrix may be made party defendant in the pending suit, under sections 4101 and 4102. 18 App. 519 (1) (89 S. E. 1052).

Timber: Letters of administration granted in another State, authorizing administratrix to administer "personal property, goods, chattels, and credits," of intestate who died while resident of State in which letters were issued, are special in character, and do not afford authority to administratrix to

maintain suit in this State to enjoin cutting of timber and to recover damages for trespass in cutting and removing timber from land. 148/721, 722 (2) (98 S. E. 543).

In suit by administratrix to enjoin cutting of timber and to recover damages for trespass in cutting and removing timber from land, it is incumbent upon judge so to frame his charge as to make it conform to pleadings and evidence, and fact that letters of administration have been admitted in evidence without objection would not authorize judge to charge that administratrix was authorized to maintain suit. Id. 721, 722 (2-a).

§ 4102. (§ 3522.) Exemplification.

Nonsuit: Failure to comply with requirement as to filing properly authenticated exemplification of letters testamentary or of administration is ground for nonsuit; filing is in time where made pending the action. 18 App. 519 (1) (89 S. E. 1052).

Objection: Where administratrix was made a party by order of court, after pendency of suit brought by her intestate, and no objection at any time

to further proceeding of suit was made upon ground that exemplification required by this section had not been filed, such objection could not thereafter be made in motion for new trial, or be raised for first time in Court of Appeals. 18 App. 519 (1-a) (89 S. E. 1052).

Seal: Exemplification signed by judge of county court under seal, and accompanied by certificate likewise signed

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by him under seal, verifying correctness of exemplification, and further certifying that county judge's court is court of record and probate court in and for the county and State, and that there is no official clerk of said court,

and that said judge was sole presiding judge thereof, and that seal was official seal of said court, and signature of clerk was genuine, etc., sufficiently complied with requirements of law. 18 App. 519 (2) (89 S. E. 1052).

CHAPTER 4.

Of Title by Contract.

ARTICLE 1.

Of Private Sales.

§ 4106. (§ 3526.) Essentials of a sale.

Applied. 17 App. 409 (87 S. E. 149).

Assent: Where goods were shipped on order under misapprehension as to identity of buyer, there was no sale under this section. 17 App. 669, 670 (1) (87 S. E. 1097).

Automobile dealer: Contract attached to petition for its breach wherein automobile manufacturer granted plaintiff privilege of selling at price fixed by contract as many as 50 cars, he to pay price and draft attached to bill of lading for each car shipped, and which, as modified by letters, did not require order of number of cars specified in schedule attached to contract and entitled plaintiff to shipment of cars as ordered, was not contract of bargain and sale, but dealer's contract, and dealer could recover only difference between contract price and price at which he was to sell cars for which his orders were accepted. 24 App. 633 (2) (101 S. E. 693).

In action against manufacturer for breach of dealer's agreement to sell automobiles, under pleadings and evidence, refusal of requested charge that dealer's letters to manufacturer instructing it to ship no cars until advised operated to cancel schedule of cars set out in dealer's agreement so that manufacturer was not thereafter bound to make additional shipments, unless it accepted dealer's additional orders, was error. 24 App. 633, 634 (7) (101 S. E. 693).

Dealers contract establishing such a relationship between local dealer and defendant distributor of automobiles, which provides that distributor is to furnish (provided he is able to do so), and in which dealer, acting in his capacity as such, agrees to accept, certain number of cars to be selected from attached schedule of models at prices which are subject to change by distributor, does not constitute binding executory contract of purchase and sale, and it is necessary that dealer shall, during life of contract, particularly specify cars which are to be furnished, in order to consummate agreement as one of purchase and sale. 24 App. 638, 639 (3) (102 S. E. 47).

Even if suit against distributor to recover deposit made under dealer's contract be construed as claim under terms of executed contract yet on consideration of its object and that agreement is inchoate as to any purchase and sale, dealer's failure to specify and order out any of cars to be furnished by distributor would not therefore constitute such nonperformance on dealer's part as to prevent his recovery of bonus paid in under its terms, nor could such failure be pleaded by way of damages in answer to such suit. 24 App. 638, 639 (3) (102 S. E. 47).

Certainty: Allegations that a seller informed plaintiff that he intended to adopt a liberal plan of profit-sharing with plaintiff and his other patrons

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did not state a contract for any certain time or for any certain amount, so as to furnish a basis for recovery for a breach thereof. 141/40 (1) (80 S. E. 318).

Contract here to sell land at certain price, "one-half cash, balance one to four years, with interest" at certain percent is too vague and indefinite to be enforced. 145/550 (89 S. E. 488).

Executory contract for future sale of commodity is not enforceable unless by terms of agreement it is so intended, and there is mutuality of obligation and certainty as to subject matter and price. 24 App. 638, 639 (3) (102 S. E. 47).

Cotton: Where contract by its terms covered entire output of cotton lintens by mill for certain season, when operated at normal capacity and in good faith, delivery of estimated number of bales by defendant would not serve to discharge defendant from liability on account of unexplained failure to operate mill and produce usual and normal output for period covered by contract. 21 App. 688 (2) (94 S. E. 1037).

Definition: Sale is transmutation of property from one to another in consideration of some price, and is transfer of property in thing for price in money and is passing of title and possession of any property for money which buyer pays or promises to pay. 14 App. 121, 128 (80 S. E. 537), citing 7 Words & Phrases 6291, 6292.

"Sale," in its broadest sense, comprehends any contract for the transfer of property from one person to another for a valuable consideration. 19 App. 39 (1) (90 S. E. 740).

Deposits: Where agents having exclusive agency for sale of certain automobiles deposited money to be used in paying part of purchase price of certain number of cars which they were required to buy, and, because of indefiniteness, agreement did not constitute contract for sale of such cars, such agents, not having specified cars in their order, were entitled to recover unapplied portion of purchase-price. 145/785, 786 (2) (89 S. E. 833).

Description: Contract and letter, which together constituted contract for sale of realty, construed, and held not to be ambiguous in description of property. 15 App. 254 (82 S. E. 914).

Evidence here authorized finding of auditor that there was no contract of sale of premises in dispute. 149/738 (1) (102 S. E. 129).

Identify articles: Description here of personal property in agreement by administrator to sell was not sufficiently definite to render agreement basis of recovery for breach thereof. 145/616 (3-a) (89 S. E. 689).

Contract here giving exclusive agency for sale of certain automobiles construed, and held that agents were not required to specify, at all events, cars to be delivered, intention being that cars would be specified only when agents should ascertain type and style of car their customer desired to purchase. 145/785, 786 (1) (89 S. E. 833).

Contract here granting exclusive agency for sale of certain automobiles construed and held so indefinite that it was not binding as contract for sale of certain number of cars, but it required specification of cars by agents to bring minds of parties together on that point and to perfect valid sale. 145/785, 786 (2) (89 S. E. 833).

Identification of things sold is element so essential to contract of sale that there can be no actionable breach of alleged contract of purchase when it does not appear that parties ever agreed as to identity of thing which was offered to be sold. 18 App. 184 (1) (89 S. E. 177).

Where in contract for sale and purchase of goods there is no agreement as to identity of things sold, action for breach of contract by refusal to accept goods tendered is not maintainable; identification of things sold is essential to contract of sale. 24 App. 34 (99 S. E. 713).

Joint owner: Where two individuals, not partners, purchase personal property and execute their joint note for the price, with a mortgage clause, one of them could not, without the consent of the other, sell the property to the original vendors in part payment of the purchase price, though he

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believes that the other has absconded. 141/368 (1) (80 S. E. 994).

Jury: Question whether minds of vendor and vendee met as to purchase price of article sold was purely question of fact. 19 App. 24 (90 S. E. 738).

Loan: Immaterial whether plaintiff moved trunk after defendant delivered it to her, except as illustrating the issue and aiding the jury in determining whether the trunk was delivered in pursuance of a sale or had merely been loaned to plaintiff. 13 App. 122, 123 (3) (78 S. E. 865).

Mutual obligations: Where party did not assume obligations to sell stock which another bound himself to buy, the contract was not binding. 13 App. 236 (2) (79 S. E. 39).

Written instrument here construed and held to be one of contract of purchase and sale upon valuable consideration, and purported to bind both parties. 148/480 (2) (97 S. E. 74).

Offer: Contract here for sale of cotton, accepted by buyers, was mutually binding and complete. 16 App. 446 (1) (85 S. E. 606).

Option: Instrument here held not to be mere option, but contract with mutual obligations on part of vendor and purchaser. 141/703, 704 (3) (82 S. E. 21).

Option to buy on credit within certain time at stipulated price was not assignable. 142/264 (1) (82 S. E. 658).

Option to purchase land, containing no words of assignability, is non-negotiable, and not enforceable by assignee. 144/185 (1) (86 S. E. 542).

Option to purchase property can be exercised, unless otherwise provided in option contract, by the mere giving, within life of option, of unconditional notice, by holder of option, to other party or his agent, that former has elected to purchase property at price and upon terms stated in option contract. 24 App. 210 (1) (100 S. E. 714).

Pawn, as defined by section 3528, is distinguishable from "sale," in that in latter title passes, while in former it does not pass. 16 App. 249 (1) (85 S. E. 86).

Price: Fact that contract provided for

selling property in parcels and paying proceeds to vendor until he should be fully paid did not prevent it from being contract of purchase and sale. 143/213 (3) (84 S. E. 543).

Where one writes to commission house that he has peaches for sale which he expects to net him certain price per crate, "and would be glad to negotiate further with you," and commission house telegraphs agreeing to "accept your offer," it constitutes no contract binding writer to sell at price mentioned. 15 App. 57 (82 S. E. 631).

Profits: That a seller notified a buyer that a certain amount would be paid him as his share of profits for each of certain years, which was done up to a certain year, when no such notice was given, and the buyer paid a higher price in the expectation of receiving profits, did not constitute a contract to pay profits, for breach of which damages could be recovered. 141/40 (2) (80 S. E. 318).

That the seller, by paying profits for several years, led the buyer to believe that the same arrangement would be continued annually in the future, does not create a profit-sharing contract for breach of which the buyer might recover. *Id.* 40, 41 (3).

Quantity: Contract here was for sale of stated quantity of rock, deliverable in approximately equal quantities for specified time, subject to be increased or diminished after notice, where amount taken would not be less than buyer's consumption, not exceeding 10 per cent. 144/75 (1) (86 S. E. 216).

Shares of stock: Where owner of shares of stock agreed to sell same, and the purchaser paid certain money and a note, and seller delivered the certificate, there was a sale, though seller failed to indorse such certificate. 148/97, 98 (2) (95 S. E. 975).

Signature: Where contract is signed by seller, but not by buyer, but latter afterwards makes and signs entry on contract that he has received part of cotton bought, contract is thereby made binding on both parties. 144/392 (1) (87 S. E. 387).

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§ 4107. (§ 3527.) **Sales by auction.**

Identify articles: Description, "iron gray mare seven years old," was legally sufficient, in contract of conditional sale. 19 App. 600 (1) (91 S. E. 920).
Option to purchase property can be exercised without payment of purchase

price, or tender thereof, unless option contract provides for such payment as condition precedent to exercise of option. 24 App. 210 (1-a) (100 S. E. 714).

§ 4110. (§ 3530.) **Protection of bona fide purchasers.**

Notice: Where, after giving voluntary deed conveying life estate with remainder, grantor gave deed reciting execution of the voluntary conveyance, second grantee took with actual notice and acquired no title as against remaindermen. 143/56 (1) (84 S. E. 126).

Vendees of grantee in voluntary deed reciting execution of former deed are

chargeable with notice of the existence of deed and rights under former. 143/377 (85 S. E. 119).

Payment: Actual payment, before notice, of purchase price is essential to maintenance of claim that one is bona fide purchaser of property for value and without notice. 148/817 (98 S. E. 493).

§ 4112. (§ 3532.) **Duress or fraud voids sale.**

Bankruptcy: That claim is proved and allowed in bankruptcy does not bar creditor's subsequent action for balance, where claim is for goods obtained by the debtor by false representations. 13 App. 501 (1) (79 S. E. 362).

Discharge in bankruptcy does not release bankrupt from liability for obtaining property by false pretenses or false representations. *Id.* 501 (2).

That creditor, after proving claim in bankruptcy and having same allowed, received a dividend did not constitute waiver of debtor's fraud in purchasing goods, and hence constituted no bar to creditor's subsequent action for balance of claim. *Id.* 501 (3).

Discharge in bankruptcy releases all provable debts except, among others, liabilities for obtaining property by false pretenses for wilful injuries to personal property, or for fraud while acting as officer or in fiduciary capacity. 17 App. 690 (1) (87 S. E. 1095); 18 App. 126 (88 S. E. 907). See 148/459 (97 S. E. 78); 22 App. 799 (97 S. E. 462).

Debt arising from collection of wages after assigned by one not standing in fiduciary capacity, nor using false pretenses or representations to obtain money, is not within exceptions to bankruptcy act, § 17, as amended by Act of Congress, Febru-

ary 5, 1903, stating debts released by discharge in bankruptcy. 17 App. 690 (2) (87 S. E. 1095); 18 App. 126 (88 S. E. 907). See 148/459 (97 S. E. 78); 22 App. 799 (97 S. E. 462).

Discharge in bankruptcy does not release bankrupt from liability for obtaining property by false pretenses or false representations. 24 App. 386 (1) (100 S. E. 776); 44 A. B. Rep. 437).

False representations from liability for which discharge in bankruptcy does not release bankrupt may consist in purchase of goods with no present purpose of paying for them, and in contemplation of fraudulent insolvency. 24 App. 386 (1) (100 S. E. 776); 44 A. B. Rep. 437).

Without evidence that goods, for purchase price of which suit was brought, were obtained by bankrupt by false pretenses or representations, consisting in their purchase with no present purpose of paying and in contemplation of fraudulent insolvency, or that insolvency was in fact fraudulent, procuring of credit on promise to pay and failure to pay before voluntary bankruptcy would not prevent release by discharge in bankruptcy. 24 App. 386 (1) (100 S. E. 776); 44 A. B. Rep. 437).

It is for jury to determine from evidence whether circumstances adduced, even though slight, are sufficient to carry conviction of existence of fraud

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perpetrated by false pretenses, liability for which would not be released by discharge in bankruptcy. 24 App. 386 (1) (100 S. E. 776); 44 A. B. Rep. 437).

Evidence: Where petition for certiorari and the answer showed that defendant admitted buying and receiving books for price of which the suit was brought, that he signed the contract of purchase, and failed to pay as contracted, it was not error to sustain the

certiorari after judgment in favor of defendant in trial court. 21 App. 174 (94 S. E. 267).

Plea: Part of answer in action for unpaid purchase-price setting up parol agreement at variance with written agreement was properly stricken, where there was no contention that the written agreement was procured by fraud, accident, or mistake. 142/263 (82 S. E. 642).

§ 4113. (§ 3533.) What is fraud.

Agent: Principal may commit fraud through his agent. 146/687 (1) (92 S. E. 63).

Evidence of part which agent takes in perpetrating fraud for benefit of his principal is admissible against the principal. 146/687 (1) (92 S. E. 63).

Burden of proof was on plaintiff in action for price which he was induced by fraud to pay for horse to show that defendant, with intent to deceive, misrepresented qualities of horse, and that plaintiff was deceived and injured. 144/700 (2) (87 S. E. 1054).

Charge: Where, in action on insurance policy, it did not appear that plaintiff made misrepresentations as to insured stock, prior to issuance of policy, this section should have been omitted from charge. 144/783, 784 (3) (87 S. E. 1077).

Debts: Where, as part of consideration for purchase price of land, vendee assumed the debts of vendor for which there were outstanding deeds to secure such debts, positive statement by vendor to vendee that debts aggregated \$6,000, where amount was \$7,500, was misstatement of material fact; and if vendee in good faith believed statement to be true, and acted upon it to his injury, such misstatement would be sufficient ground for petition by grantee to cancel deed. 149/555 (1) (101 S. E. 177).

Fact that outstanding security deed and mortgage may have been matters of public record would not affect the case. *Id.* 555 (1-a).

Diligence: Where one purchasing real estate has opportunity to examine it before buying, but, instead of doing so, voluntarily relies upon statements of vendor concerning its character and value, contract will not be rescinded or

set aside, or purchase price abated, because of falsity of statements, unless some fraud or artifice was practiced by vendor to prevent such examination; this is true even though vendee may have acted upon misrepresentations of vendor or his agent. 24 App. 475 (1) (101 S. E. 196); 485 (1) (101 S. E. 196).

Future: Promises to perform some act in the future, especially promise to pay money, do not amount to fraud in legal acceptance, though subsequently broken without excuse. 24 App. 386 (1) (100 S. E. 776, 44 A. B. Rep. 437).

Incumbrance: Where purchaser is in possession under bond for title on payment of price he can not defeat collection of purchase-money notes on ground that title is incumbered without proving fraud or other facts authorizing equitable interference. 14 App. 644 (2) (82 S. E. 155).

Inducement: Plea averring that note sued on was given in payment of price of certain diamond rings, that part of consideration was guarantee that rings should weigh certain number of karats, that such weights were warranted by plaintiff, and that on faith of this warranty defendant bought the rings, sufficiently indicated that guarantee as to weights was made before purchase and not thereafter, and that alleged false representations as to weights induced the purchase. 19 App. 125 (1) (91 S. E. 214).

Knowledge of falsity: Representations as to quality of well water and in regard to ponding of water here not shown to be fraudulent, both parties having examined the land. 140/112 (78 S. E. 809).

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Where plaintiff failed to show misrepresentations made by defendant's agent were known by her to be false, or were such that they must have been made with intent to deceive, court properly granted nonsuit. 143/212 (84 S. E. 538).

Petition in action by purchaser for breach of warranty which did not allege that defendant knowingly sold or attempted to sell to plaintiff land to which he had no title, was not good as action founded on fraud and deceit. 146/352 (3) (91 S. E. 117).

Opinion: Opinionative statement of seller's agent as to value or salability of patented articles is not such fraud, though untrue, as will entitle buyer to avoid sale. 14 App. 803 (1) (82 S. E. 355).

Oral representation by agent that article sold will prove salable and produce certain named profits can not be basis for rescission by buyer. Id. 803 (2).

Pleading: Equitable petition here to recover money paid for corporate stock which plaintiffs were induced to buy through fraudulent representations was not demurrable. 143/84, 85 (2) (84 S. E. 461).

Plea as to false representations in sale of corporate stock, that it was free from lien, was properly stricken here. 16 App. 459 (85 S. E. 632).

Allegations that person was induced to enter into contract with others by certain representations, characterized as fraudulent, but not alleged to be untrue, were subject to special demurrer. 145/268, 269 (5) (88 S. E. 968).

Value: On opportunity for buyer to examine for himself, representations by seller as to value of goods constituted no defense in action for price. 142/49 (1) (82 S. E. 441).

Warranty: Action of deceit can not be supported by proof of damages resulting from breach of warranty. 17 App. 49 (3) (86 S. E. 91).

§ 4114. (§ 3534.) **Concealment, when fraud.****General Note.**

Cited. 16 App. 436, 443 (85 S. E. 625).

Physician: Where it was understood that physician would not further care for defendant's son unless employed

by him, defendant, by accepting plaintiff's services, became bound therefor though there was no express contract for payment. 14 App. 409 (1) (81 S. E. 252).

§ 4115. (§ 3535.) **Mistake.**

Stated. 140/148, 154 (78 S. E. 938).

§ 4116. (§ 3536.) **Duress.**

See § 4255 and notes.

Construction: Section 4317 should be construed together with this section. 19 App. 256 (1) (91 S. E. 281).

Husband and wife: Husband's threat to abandon wife unless she signed note not duress such as invalidated note where she had no reasonable apprehension of threat being carried out.

143/186 (84 S. E. 467).

Scope: Definition of duress in this section includes any conduct overpowering the will and coercing or restraining the performance of act which otherwise would not have been performed. 143/186 (84 S. E. 467).

§ 4117. (§ 3537.) **Possibility can not be sold.**

Stated and applied. 144/395 (1, 2) (87 S. E. 479).

Automobile dealer: Dealer's contract establishing such a relationship between local dealer and defendant distributor of automobiles, which provides

that distributor is to furnish (provided he is able to do so), and in which dealer, acting in his capacity as such agrees to accept, certain number of cars to be selected from attached schedule of models at prices which are

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subject to change by distributor, does not constitute binding executory contract of purchase and sale, and it is necessary that dealer shall, during life of contract, particularly specify cars which are to be furnished, in order to consummate agreement as one of purchase and sale. 24 App. 638, 639 (3) (102 S. E. 47).

Conditional: Will here construed and held that petitioner's right to land was contingent upon incumbrances being removed and named person being in life at expiration of ten years from death of testatrix; latter contingency not having happened, estate was vested in such named person, and judge did not err in sustaining demurrer. 149/471 (2) (100 S. E. 566).

Cotton: Fact that plaintiff company paid only part of purchase money for cotton, and later made resale of cotton before delivery was actually made to it, did not show that transaction was not bona fide; spirit of law is not against legitimate purchase and sale of cotton by those whose business is such that they must deal in the actual commodity, but the law is aimed at gambling. 18 App. 645 (90 S. E. 175).

There is no merit in ground of demurrer that certain paragraph of petition, to wit, "petitioner shows that at the date said cotton was purchased by it, all parties contemplated an actual delivery of the cotton in compliance with the terms of said sale," seeks to vary terms of alleged written agreement, such paragraph being merely explanatory, where correspondence between the parties, set out in petition shows that actual delivery of cotton was contemplated by them. 23 App. 675, 676 (4) (99 S. E. 308).

Evidence: Letters in which defendant offered to give plaintiff his notes for amount claimed as damages for breach of contract were admissible to show wagering contract. 143/470 (2) (85 S. E. 319).

Testimony of one party that he has resold cotton, which other party contracted to deliver, was inadmissible on issue whether sale was mere speculation scheme. *Id.* 470 (5).

Evidence of acts of buyer after contracting to buy cotton for future delivery inadmissible to show that con-

tract was not a wager. 143/569 (4) (85 S. E. 756).

The fact that either of the parties had offered or agreed to take a sum of money in lieu of fulfillment of precise terms of contract might be circumstance from which jury could infer that sale of actual cotton was not intended. 13 App. 35, 37 (78 S. E. 778)

Future delivery: Executory agreement for sale of goods to be delivered at future date is valid; it is not invalid as a gambling contract, unless neither of the parties contemplated an actual delivery. 142/429, 431 (2) (83 S. E. 207).

Contract not void as wagering contract unless seller had no intention of delivering cotton and buyer knew seller's intention. 143/470 (1) (85 S. E. 319).

Contract for sale of cotton for future delivery or payment of difference in value was not wagering contract. 143/569 (1) (85 S. E. 756).

Party to contract for sale of cotton for future delivery who sets up that contract is illegal, for reason that it was intended that cotton should not be delivered, must, in order to relieve himself, show that such was intention of both parties. 14 App. 344 (2) (80 S. E. 731).

Contract for future sale or delivery of cotton, by one engaged in business of growing cotton for market, to be grown on his land in certain year, does not affirmatively show on its face that it was gaming contract. 14 App. 515 (4) (81 S. E. 593).

Executory contract for sale of cotton is not gambling contract, unless neither of parties contemplated actual delivery. 16 App. 446, 447 (7) (85 S. E. 606).

That firm has been organized to speculate in cotton through method of contract for future delivery, will not necessarily invalidate cotton contract made by it. *Id.* 446, 447 (9).

If one of the parties to contract for sale of cotton for future delivery, apparently valid on its face, enters into contract evidenced by writing with no intention of delivering actual cotton, but upon understanding that settlement is to be had by parties on day appointed for delivery, based on dif-

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ference between market price at that time and contract price, and such intention is known to opposite party at time of signing writing, transaction will be regarded as a wager and not an enforceable contract. 146/277 (1) 91 S. E. 51).

When considered in connection with allegation of petition in seller's action to recover difference between contract price and proceeds of resale by him that "said sale and purchase were confirmed in writing by plaintiff and by the defendant," statement of alleged contract of sale is not of a mere offer, proposal, or unilateral agreement, nor of an executed contract of sale, but of an executory contract for

sale of goods to be delivered in the future. 24 App. 581, 582 (3) (101 S. E. 706).

Executory contract for future sale of commodity is not enforceable unless by terms of agreement it is so intended, and there is mutuality of obligation and certainty as to subject matter and price. 24 App. 638, 639 (3) (102 S. E. 47).

Law business of deceased attorney, excluding all uncollected fees and choses in action belonging to deceased, and pending claims wherein arrangements had been made with other attorneys to handle, is a mere possibility not subject to sale. 141/75 (80 S. E. 551).

§ 4118. (§ 3538.) **Title conveyed.**

Cited. 17 App. 170, 179 (86 S. E. 434).

After-acquired title: Covenant of warranty in deed purporting to convey bare possibility will not inure to benefit of purchaser or his heirs so as to subject to covenant after-acquired property of vendor. 144/395 (1-a) (87 S. E. 479).

Son has no interest in property of mother by reason of fact that he will be her heir at law if he should outlive her, which will support equitable action during her life to reform deed made by her, or to obtain decree impressing with trust in her favor the property conveyed. 145/103 (1) (88 S. E. 564).

Negotiable instruments: While seller ordinarily can not convey greater title than he owns, one exception to such rule is that bona fide purchaser of negotiable paper not dishonored will be protected in his title, though seller had none. 21 App. 624 (1) (94 S. E. 853).

Where negotiable paper is complete in form and duly signed, and prior to its delivery is feloniously taken by the payee, and prior to its maturity is indorsed and passed by the unlawful taker to bona fide holder for value, innocent purchaser is protected in his title, and can recover against the maker. 21 App. 624 (1) (94 S. E. 853); 22 App. 667 (1) (97 S. E. 109); affirmed, 149/88 (99 S. E. 41).

See § 4286 et seq. and notes.

Possession: While possession of personal property is presumptive evidence of ownership, presumption is not conclusive, and any person dealing with the possessor as the owner will not obtain title to the property as against the true owner, unless the latter has done something to mislead or deceive such purchaser. 22 App. 753, 754 (3) (97 S. E. 251).

Railroad: Where landowner acquiesces in construction of railroad on his land, his vendee takes the land subject to burden of railroad. 144/92 (1) (86 S. E. 228).

Remaindermen: Where three devisees conveyed their interest as remaindermen, their vendee obtained good title as against children of fourth remainderman. 142/775 (83 S. E. 790).

Wife's ownership: If husband uses money of wife, with or without her consent, and thereby acquires title in himself to property, third persons who bona fide take title for value to such property will be protected. 154/184, 185 (7-a) (88 S. E. 949).

Where written title to land is in husband, although he may have paid for it with wife's money so that he holds it in trust for her, yet if no trust appears on face of title, purchasers for value from him or from his vendee are protected against her equity unless they had notice of it, actual or constructive, when they acquired their interest and parted with their money. 149/529 (1) (101 S. E. 120).

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§ 4119. (§ 3539.) **Agent in possession and with apparent right to sell.**

Notice: Where one ships to another shingles and forwards by mail to consignee bill of lading, and makes draft for half the purchase price, under agreement that consignee shall pay such amount on receipt of bill of lading, and that remainder shall be paid after inspection of shingles, and consignee receives bill of lading but fails to pay draft, and transfers to third

person property described therein, and that person, for value, transfers property to another, who purchases in good faith and with no notice of defect in title or of fraud on part of original consignee, action of trover can not be maintained against last named purchaser. 18 App. 658 (2) (90 S. E. 356).

§ 4120. (§ 3540.) **Purchaser without notice, protected.**

Bills of lading: See notes to §§ 4133, 4134.

Fraud: Where owner who has obtained title by fraud conveys to third person

to discharge pre-existing debt, latter is purchaser for value, in absence of bad faith and notice. 144/587, 588 (5) (87 S. E. 799).

§ 4121. (§ 3541.) **Contracts entire or divisible.**

Charge: Where action was based upon an entire contract not error to confine consideration of jury to recovery for full amount of contract price, in case jury found for plaintiff. 13 App. 470 (2) (79 S. E. 373).

Delivery: Seller could not, by only partially filling order and delivering part of goods ordered, upon refusal by purchaser to accept, recover value of goods so shipped. 140/411 (78 S. E. 1094).

Contract here for sale and purchase of coal, with equal monthly deliveries, was severable as to each month's deliveries, and inability to make delivery during time mines were in control of Federal Fuel Administration discharged seller from obligation to make deliveries, but not from obligation to make deliveries after such control had ceased. 262 Fed. 555 (2).

Contract which provides for sale of specified commodity, to be shipped to purchaser at named price, shipment to be completed within stated period, constitutes an entire contract, although subject-matter is divisible. 23 App. 561 (3) (99 S. E. 166).

A contract for the purchase of 15,000

fertilizer bags at a stated price per thousand, "printing usual, delivery Jan./May next," to be shipped "in approximately equal quantities during the months named," was entire and not severable. 23 App. 598 (99 S. E. 167).

Intention: Contract for sale of 1000 bushels of yellow-bottom onion sets, 25 bushels of red-bottom onion sets, and 1000 bushels of white-bottom onion sets, for shipment about January 10, 1911 (weather permitting), is to be construed as entire contract. 145/559 (1) (89 S. E. 486).

Where contract of sale of goods is entire, failure of purchaser to pay for separate shipment upon its delivery and prior to delivery of entire amount would not, as matter of law, operate as breach of contract on his part, where there is not shown any such previous course of dealings between the parties or any such custom of trade as might raise implications that intention different from one just indicated was in minds of parties at time contract was effected. 23 App. 561 (3) (99 S. E. 166).

§ 4122. (§ 3542.) **Deficiency in sale of lands.**

Cited. 148/267, 268, 269 (96 S. E. 428).

Acre: Where land has been sold by the tract, number of acres being mentioned only as part of description, in absence of reformation of deed for fraud there can be no recovery by purchaser for

deficiency in quantity. 143/726 (1) (85 S. E. 851).

If sale is intended to be in gross, mere mention of acres, or of feet, after certain other description, such as metes and bounds, is not a covenant as to

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quantity to be conveyed. 22 App. 388, 390 (95 S. E. 1006).

Administrator's sale: Provision of this section for apportionment of purchase price on account of deficiency of acreage in sale of land where purchase is by the acre, has no application to administrator's sales, the doctrine of caveat emptor having application to administrators' sales. 149/219 (1) (99 S. E. 855).

Allegation that deed was result of mutual mistake and was so made by the scrivener in drawing the deed does not take the case without the above principle. *Id.* 219 (2-a).

Answer, in ejectment suit by vendor against vendee praying for accounting for amount paid by defendant on purchase price of land, set up substantial equity and was sufficient as a basis for a decree. 148/418 (2) (96 S. E. 993).

Boundaries: Where words "more or less" were omitted from deed, addition of such words would not establish boundary so as to include additional strip of land claimed. 142/434 (3) (83 S. E. 105).

Where one purchases tract of land, and boundaries are pointed out to him by vendor and warranty deed is executed, intended to convey land as pointed out, but in fact describing only part of the land, purchaser can not, as for breach of warranty contained in deed, recover damages from grantor on ground that omitted land belonged to another. 146/352 (2) (91 S. E. 117).

Mistake: Instruction in purchaser's action based on deficiency in quantity of land that burden was on plaintiff to show mistake in tract, that it was intended that an exact number of acres should be conveyed, and that provision as to survey of land was omitted by oversight, was error, where such mistake was not alleged in petition. 143/726 (2) (85 S. E. 851).

"More or less:" Where the words "more or less" are used in giving the dimensions of land, in order for one party to the sale to be entitled to a reduction on account of fraud by the other, the fraud must be actual. 140/259, 263 (78 S. E. 897).

Where vendee in deed describing land as containing 100 acres more or less contended that she bought by the acre

and employed a surveyor to mark out of the vendor's land adjoining the tract conveyed, without the consent of or notice to the vendor, a sufficient number of acres to make up a deficiency, but the original vendor cleared the land surveyed and cultivated it for four years, neither the vendee nor her subsequent vendee took title to such surveyed land. 140/289 (78 S. E. 1005).

Deed which describes premises, giving boundaries and estimating area as containing certain number of acres, "more or less," conveys all land embraced in clause although acreage may exceed estimate. 142/37, 38 (4) (82 S. E. 442).

Where land is sold as containing certain area, "more or less," and both parties with equal opportunity act in good faith, deficiency will not be apportioned; rule is otherwise where vendor is guilty of actual fraud. 142/682 (83 S. E. 511).

Petition in action for deficiency in quantity of land stating not only that vendor's agent misrepresented the quantity, but fraudulently stated the legal effect of the words "more or less," was not demurrable. *Id.*

Purchase price: If upon accounting prayed by defendant vendee in ejectment suit by vendor it should be determined that defendant had fully paid purchase money, she would be entitled to relief prayed; if it should be determined that she had not fully paid purchase price, she would be entitled, upon payment of balance due, to decree for portion of land to which plaintiff could execute title in conformity with his bond. 148/418 (2) (96 S. E. 993).

Tract: Where land is bargained by the tract, deficiency in acreage can not be apportioned unless purchaser can show that actual fraud was perpetrated by vendor. 19 App. 270 (1) (91 S. E. 345); 24 App. 586 (1) (101 S. E. 591).

Where, in suit on note for purchase price of land bargained by the tract, maker undertakes to have alleged deficiency in acreage apportioned in amount of recovery, but does not allege and prove actual fraud on part of vendor, plaintiff is entitled to judgment in whole amount of note, and fact that jury may have rendered ver-

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diet allowing portion of shortage as shown by evidence does not give defendant right to complain. 19 App. 270 (2) (91 S. E. 345); 24 App. 586 (1-a) (101 S. E. 591).

Description in bond for title describ-

ing land conveyed as extending along certain named streets and lots indicated a sale by the tract within this section. 22 App. 388, 389 (95 S. E. 1006).

§ 4123. (§ 3543.) Loss must fall on the owner.

Breach of contract: Purchaser who breached contract to pay draft for price of goods and remove them from railroad station, title to remain in seller until paid, is not liable for loss occasioned by destruction of goods by fire in depot. 144/37 (85 S. E. 1036).

Death: Where note given for purchase-price of horse reserves title to the seller until paid for, loss in case of death without fault of the buyer will fall upon the seller, in absence of stipulation to contrary; stipulation that seller does not insure the life of the horse, but in case of loss, the same shall be the loss of the buyer, includes loss by death. 13 App. 255 (79 S. E. 92).

Where promissory note given for purchase price of mule and reserving to seller title until payment of note contains stipulation that seller "makes no warranty, either express or implied, as to soundness, health, or habits of said property, but the maker hereof assumes all risk in reference thereto, and shall not be entitled to abatement of amount of this note for any reason whatsoever," it is no defense to suit on note that mule died without fault

of purchaser, while in his possession. 24 App. 646 (101 S. E. 815).

Evidence: Where to action of trover for diamond stud, sold by plaintiff to defendant under contract retaining title until payment of price, defense pleaded was that stud had been lost without fault of defendant, and where only testimony was his statement that he "lost the same while in bathing," defendant failed to carry burden which law imposed upon him, and evidence demanded finding for plaintiff. 24 App. 290 (100 S. E. 654).

Fault: In order for vendee of personalty under contract reserving title to vendor to rescind contract or have abatement in price on its destruction, it must affirmatively appear that property was destroyed without vendee's fault. 143/732 (3) (85 S. E. 873).

Fire: Under conditional sale contract here buyers suffer loss from destruction of machinery by fire while in their possession. 142/830 (83 S. E. 944).

Personal property: Where personal property is destroyed by fire, loss must fall upon him who holds title. 18 App. 639 (2) (90 S. E. 79).

§ 4125. (§ 3545.) Delivery of goods essential.

Automobile dealer: In action against manufacturer for breach of dealer's agreement to sell automobiles, under pleadings and evidence, refusal of requested charge that dealer's letters to manufacturer instructing it to ship no cars until advised operated to cancel schedule of cars set out in dealer's agreement so that manufacturer was not thereafter bound to make additional shipments, unless it accepted dealer's additional orders, was error. 24 App. 633, 634 (7) (101 S. E. 693).

Bankruptcy: Title to goods consigned to one who subsequently becomes bankrupt does not pass to trustee in bank-

ruptcy, as trustee gets no other or better title than that of bankrupt, and bailtrover suit can be maintained by true owner against one who purchased such consigned goods at the bankrupt sale. 18 App. 460 (1) (89 S. E. 504, 37 A. B. Rep. 500).

Bill of lading: The execution of a bill of lading is not necessary to evidence such a delivery to a common carrier as will be equivalent to delivery to the consignee. 13 App. 790 (1) (79 S. E. 1130).

Bill of lading is symbol representing goods, and delivery of bill is delivery of goods. 15 App. 377 (83 S. E. 504).

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Carrier: Evidence in action for price of goods that they had actually been delivered to defendant buyer by carrier authorized judgment for plaintiff, regardless of whether valid agreement was made to release defendant and look alone to carrier for value of the goods. 13 App. 495 (1) (79 S. E. 374).

Delivery of shipment to carrier with bill of lading attached to draft is not delivery to consignee and title does not pass to consignee as purchaser. 14 App. 47 (1) (80 S. E. 21).

Rule that delivery of freight to common carrier is delivery to consignee may be varied by agreement. 14 App. 381 (1) (80 S. E. 863).

Where goods are found to be in damaged condition on arrival, consignee's right to reject such goods depends on contract with shipper. *Id.*

Where goods are sold "f. o. b. cars" at time of shipment, contract is complied with by delivery to any one of several common carriers in city, whether cars are on regularly used spur or sidetrack, or on main line, or at depot of carrier, at point of shipment. 14 App. 778 (82 S. E. 372).

While ordinarily, as between consignor and consignee of goods which consignee has directed consignor to ship to him, delivery by consignor to carrier of goods is delivery to consignee, yet where order and contract for goods names carrier to whom they are to be delivered for shipment, delivery to carrier other than as contracted is not delivery to consignee; especially is this true where uncontradicted evidence shows that goods were never received by consignee. 22 App. 537 (1) (96 S. E. 346).

Without agreement to contrary, delivery of freight to common carrier is regarded as delivery to consignee, and any loss or damage to goods in transit would fall on him; such rule may be varied by agreement. 24 App. 610 (1) (101 S. E. 697).

Constructive delivery: Where sale is relied upon by one as vendee, and it appears that possession is retained by vendor, something more than parol agreement of sale relating to transfer of title and possession is necessary to constitute constructive delivery; after contract was made, some

act must have been done within intention of parties indicating assertion of dominion over goods by vendee, and it is no objection that such act be done by vendor as agent of vendee. 21 App. 615, 616 (4) (94 S. E. 827).

Damages: Where party contracts to deliver goods at particular time and place, and no payment has been made, true measure of damages is difference between contract price and that of like goods at time and place where they should have been delivered. 22 App. 578 (2-a) (96 S. E. 437).

Vendor failing to comply with his contract to deliver goods ordered would not be liable for special damages because of consequent inability of purchaser to fulfill particular contract of resale, unless at time of accepting order he had notice that goods ordered were subject of resale. 22 App. 578 (3) (96 S. E. 437).

Where seller fails to deliver goods in time specified in contract, and purchaser thereafter urges delivery, impliedly offering to waive claim for damages on account of delay, subsequent compliance by seller with his acceptance of terms of proposal, within time specified, or, if no time is specified, then within reasonable time, by tendering property called for by contract, will furnish valid consideration for proposal and operate to render it binding upon purchaser. 23 App. 561 (1) (99 S. E. 166).

If only portion of property should be thus subsequently tendered by seller as in part compliance with proposal, purchaser's acceptance of portion tendered would bind him under his waiver to extent of tender and acceptance, though reasonable time covered by extension might have in fact expired; but waiver of damages by such acceptance would be pro tanto only, and would not operate as waiver of purchaser's claim for damages on basis of original breach, as to portion of goods remaining undelivered. *Id.*

Where partial tender and acceptance of goods was made at time subsequent to expiration of reasonable extension implied under proposal made by purchaser, and purchaser makes additional offer to waive all damages incurred by seller's delay, provided remainder

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of contract should be fully completed by certain date, latter offer does not amount to agreement binding purchaser unless seller complies with condition imposed. 23 App. 561 (2) (99 S. E. 166).

Upon seller's rejection of new proposal at time when his reasonable period of extension under former proposal might be taken to have already expired, his liability for damages, on basis of original breach, for failure to deliver portion of goods still outstanding under order, became absolute, and purchaser would have right to withhold any payments actually due seller under previous shipments, to extent of his damage thus sustained. *Id.*

Measure of damages for breach of contract to deliver cotton is difference between contract price and market price at time and place of delivery. 23 App. 675, 676 (6) (99 S. E. 308).

Date when alleged breach of contract by plaintiff occurred was material fact, where defendants admitted that they had received from plaintiff, under contract, amount of goods stated in petition; and had date been alleged, plaintiff might have shown that at that time defendants had already breached the contract by failure to pay for goods delivered, and in such event defendants could not recover damages for subsequent failure by plaintiff to comply with contract. 23 App. 641 (2) (99 S. E. 225).

Delay: In absence of evidence that seller's delay in delivering machine was immaterial, or that buyer by his conduct waived compliance with contract provision requiring delivery as early as possible, not error to charge that it was defendant's duty to comply with all terms of contract. 16 App. 470, 471 (3) (85 S. E. 677).

Mere acceptance of purchased goods after agreed time of delivery will not of itself, and unaccompanied by attending circumstances manifesting such an intention on part of buyer, amount to waiver of resulting damages on account of delay. 24 App. 635 (1) (101 S. E. 588).

Where seller has broken terms of contract as to time for delivery of goods, offer by buyer to accept them and waive all damages for previous de-

lays, on express condition that goods be delivered on specified day, would be conditional only, and would not be binding on buyer until compliance with condition. 24 App. 635 (1) (101 S. E. 588).

Where plaintiff failed to deliver goods on day named in offer to waive previous delays on condition that goods be delivered on specified day, but delivered only portion thereof on day following that specified, it can not be said as matter of law that acceptance by buyer of delivery of portion thus made was waiver of damages resulting from original breach. 24 App. 635 (1) (101 S. E. 588).

Demand for delivery of property was not condition precedent to buyer's right to sue for breach of contract. 16 App. 446 (3) (85 S. E. 606).

Where, under true construction of contract, time of shipment of flour was limited to months of November and December, and as to such provision time was of the essence of the contract, plaintiff, not having ordered out the flour within the time specified in the contract, had no right of action for breach of contract against defendant for failure to deliver remainder of flour. 22 App. 524 (3) (96 S. E. 583).

Where executory contract for sale of goods provides for delivery of goods on order during certain period, time is of the essence of the contract, and failure to order delivery during that period terminates right to order shipment of the goods. 22 App. 693 (1) (97 S. E. 99).

Evidence: Verdict for plaintiff in action on open account was without evidence to support it where no witness testified as to the sale to defendant of the goods involved, nor as to delivery of such goods to defendant, and it not being shown that the salesman was dead or that his testimony could not be procured. 140/253 (2) (78 S. E. 848).

Executed contract: Where terms of sale are agreed upon and the bargain struck, and everything that the seller has to do with the goods is completed, the contract of sale becomes absolute and the property rests in the buyer. 21 App. 160, 161 (5) (93 S. E. 1018).

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Executory contract: Where contract of purchase and sale of goods was executory on both sides, notice by purchaser to seller to cancel purchaser's order was breach of contract, and seller could not by attempt to deliver the goods treat contract as performed on his part and sue purchaser for full purchase price. 23 App. 633 (1) (99 S. E. 138).

Installments: Where delivery of goods is to be made in installments, measure of damages is sum of difference between contract price and market price at the several times of delivery. 22 App. 578 (2-b) (96 S. E. 437).

Where, under terms of contract, seller may make deliveries in weekly installments ranging from minimum to maximum number, he complies with request by delivering minimum number specified. 24 App. 717 (3) (102 S. E. 137).

Market value: If there is no market at the place of delivery at time fixed therefor, resort may be had to nearest available market, with cost of transportation to place of delivery usually added. 22 App. 578 (2-c) (96 S. E. 437).

Part: Cause of action was set forth by petition alleging that defendants accepted offer to buy 400 bales of cotton as per terms of letter addressed to them and signed by plaintiff, at certain price per pound, said cotton to be of specified grade and to be delivered on fixed dates; that 200 of said 400 bales were delivered and accepted and paid for as per terms of contract; and that plaintiff stood ready and willing to receive and pay for remaining 200 bales upon their delivery, and that defendants breached contract by refusal and failure to deliver remaining 200 bales. 23 App. 675 (1) (99 S. E. 308).

Petition: Where petition alleged that plaintiff had demanded of defendant

that he comply with his contract to sell hay, and that defendant had failed and refused to do so, such allegations were germane and material to plaintiff's cause of action for damages for breach of contract. 24 App. 504, 505 (5) (101 S. E. 393).

Price: Where buyers fail to make payments when due, they can not recover damages for failure of plaintiffs to ship additional goods thereafter pursuant to contract. 14 App. 141 (2) (80 S. E. 525).

Quantity: Contract to deliver 240 sacks of sweet potatoes was not complied with by tendering 237 sacks of potatoes. 17 App. 42 (2-b) (86 S. E. 402).

Failure of buyer to assign shortage in quantity as reason for refusal to accept was not waiver of right to plead seller's failure to comply with contract. Id. 42 (2-c).

Whether buyer waived right to insist on delivery of exact quantity, and whether seller's tender to supply deficiency reasonably amounted to compliance with contract, was for the jury. Id. 42 (2-b).

"Request:" Where contract for sale of cotton contained "request" that, on seller's failure to deliver, buyer go into market and buy number of bales sold, such "request" rather conferred on buyer authority to buy than bound him to do so. 144/392, 393 (2) (87 S. E. 387).

Tender: Where buyer agreed to pay part cash and give notes for balance, seller to retain title until full payment, tender conditioned on buyer's compliance does not transfer title to him. 143/581 (1) (85 S. E. 856).

Charge that if seller failed to tender delivery of car during life of contract, buyer could recover deposit made to seller was not objectionable as ambiguous, in failing to state what was life of contract. 16 App. 470, 471 (4) (85 S. E. 677).

§ 4126. (§ 3546.) Title in certain articles not to pass until paid for.

Cited. 14 App. 288, 289 (80 S. E. 789).
Action: Action here by cotton broker which appropriated proceeds of draft received on resale of cotton to the purchaser's indebtedness held to be

not upon the contract. 145/870, 871 (1) (90 S. E. 55).

Cash sales: Where there is delivery of spirits of turpentine by producer, on cash sale, title of seller remains undi-

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vested until payment in full of purchase-price, and may be asserted by him even as against bona fide purchaser from his vendee. 145/798 (2) (89 S. E. 838).

Commission merchant: In absence of special demurrer to allegation that plaintiff was warehouseman engaged in business of selling cotton petition here brought case within this section. 145/870, 871 (2) (90 S. E. 55).

Amendment to petition, alleging that defendants were commission merchants engaged in business of selling cotton for their customers on commission, and that they were therefore engaged in the same business as plaintiff and were in the same class and entitled to the protection of the same laws, should have been stricken upon demurrer. 149/660 (2) (101 S. E. 804).

Where payment of buyer's checks for cotton was refused and plaintiff commission merchant was not paid for it, title to cotton had not passed from plaintiff when defendant bank received bill of lading for it, with buyer's draft on subsequent purchaser for purchase price, which bank collected and applied to pre-existing indebtedness of original buyer to itself; court did not

err in directing verdict for plaintiff. 20 App. 320 (93 S. E. 113).

Constitutionality: Section is not unconstitutional on ground that it is special legislation, or that it denies equal protection of laws, in violation of Federal and State Constitutions. 149/660 (1) (101 S. E. 804).

Planters: Right of action given by this section is to planter who owns cotton, not one who sells same as agent of another. 143/588 (2) (85 S. E. 706).

Where, in compliance with this section, plaintiff proved that he was farmer, that cotton was product of his labor, that sale thereof was for cash and that he was not paid, that property went into possession of defendant either as principal or as agent of another who had no title, demand and refusal to surrender or pay profits thereof, and value of property, and all such facts were uncontradicted, defendant merely setting up that it was gratuitous bailee, and therefore not liable, first new trial, verdict having been directed for defendant, will not be disturbed. 22 App. 471 (1) (96 S. E. 341).

§ 4127. (§ 3547.) Sales of articles being manufactured.

Renunciation: Where on renunciation of contract by purchaser, seller fails or refuses to manufacture the goods, his only remedy is to sue for damages for breach of contract; he can not sue upon open account. 13 App. 551 (79 S. E. 485).

If contract be an entire one for manufacture of a quantity of articles, remedy of seller to store and retain goods for the vendee and sue for the purchase-price is not available unless entire quantity of articles contracted for has been manufactured. *Id.*

§ 4128. (§ 3548.) Consideration.

Amount of recovery: Contract being unambiguous and defendant not having returned to plaintiff and received credit for goods not sold, plaintiff was entitled to recover full amount sued for. 13 App. 467 (79 S. E. 356).

Credit: Amount which by agreement was to be allowed for article sold, as credit on price of another article to be purchased by plaintiff, furnished sufficient consideration. 17 App. 409 (87 S. E. 149).

§ 4129. (§ 3549.) Inadequacy, effect of.

Mere inadequacy of price is not alone sufficient reason for setting aside deed, especially where allegation as to real value is uncertain as to time when

it was of that value. 145/368 (4) (89 S. E. 330).

Option contract for sale of land is not subject to attack because of in-

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adequacy of consideration named in it; nor is it necessarily rendered unenforceable by failure to pay consideration named. 24 App. 217 (1) (100 S. E. 644).

Sheriff's sale: Inadequacy of considera-

§ 4130. (§ 3550.) **Purchase price, when due.**

Stated. 145/601 (3) (89 S. E. 680).

Condition: Where personal property is sold upon express condition that sale is for cash, but, that buyer is to have three or four days after delivery to examine shipment, and, if correct to remit for it, and, if not correct, to return it immediately, and property is delivered on faith that condition will be immediately performed, and performance is refused upon demand in reasonable time, or property is actually converted by buyer, no title passes to him, and trover will lie to recover the goods or their equivalent in money. 18 App. 267 (1) (89 S. E. 374).

Interest: Under evidence here verdict in favor of plaintiff for full amount of purchase price of fruit, with interest, was demanded. 145/635 (89 S. E. 717).

§ 4131. (§ 3551.) **Remedy of seller on default of buyer.**

Attorney's fees not recoverable in action for breach of executory contract on sale not stipulating for such fees. 143/581 (2) (85 S. E. 856).

Carrier: Before suit can legally be brought for entire purchase-price of goods shipped by common carrier, seller must relinquish title thereto and title must pass to the purchaser; seller can not retain the goods and also recover the full price. 21 App. 723 (94 S. E. 908).

Charge: Where contract provided that cross-ties should be of certain dimensions, and it appeared that a large number did not conform to specifications, error to charge that if ties were reasonably within measurements and were reasonably of the class of ties that were to be delivered, and they were delivered, then it would have been duty of purchaser to have received and paid for such ties. 140/592 (2) (79 S. E. 459).

Also error to charge that if ties were delivered where purchaser pointed out they should have been, and they were

tion, though it be gross and strong circumstance to show fraud, is not sufficient per se to cause sheriff's sale to be set aside. 141/687 (2) (82 S. E. 32).

Jury: Whether there was sale, notwithstanding non-payment of purchase price, was question for jury here. 148/627 (97 S. E. 671).

Title: Where seller delivered trunk to buyer without reserving title, it became the property of the buyer as completely as if purchase price had been paid in full before delivery. 13 App. 122, 123 (3) (78 S. E. 865).

Where personalty is sold on cash sale, title does not pass until purchase-money is paid. 13 App. 458 (1) (79 S. E. 371).

Fact that part of purchase-money received had not been returned did not pass title into purchaser, but merely gave him right to complete sale and obtain title by payment of balance due. Id. 458 (2).

reasonably up to the contract as to specifications, it was purchaser's duty to receive them. Id.

Conditional sale: Where conditional bill of sale gives seller power to sell property, after notice, on default, and on such default after due notice he sells as agent of buyer, and himself buys, sale, though voidable, is not void if free from fraud. 14 App. 366 (80 S. E. 902).

Deliver: Where seller has retained goods, he can not recover full price in action for breach of contract. 143/581 (4) (85 S. E. 856).

Although seller may have delayed deliveries and failed to make them on time as contracted for, purchaser can not, after accepting such delayed deliveries and also subsequent deliveries, and failing to make payment due therefor under the contract, hold the seller liable for failure to continue making any further deliveries contracted for. 24 App. 717 (2) (102 S. E. 137).

Where seller agrees to deliver to purchaser commodities in specified quanti-

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ties weekly and at designated prices payable on first of each month after delivery, failure by letter to meet payments when due relieves former of any obligation to make further deliveries. 24 App. 717 (1) (102 S. E. 137).

Evidence: Verdict here that certain cross-ties were sold to defendant and not to a certain third person held not supported by evidence. 140/364 (78 S. E. 1055).

Evidence here in action for price of articles sold sustained verdict for plaintiff. 14 App. 520 (3) (81 S. E. 595), 754 (2) (82 S. E. 309).

Evidence here in seller's action for breach of contracts for fertilizer material was sufficient to sustain verdict for plaintiff, when considered with admissions in pleadings. 15 App. 601 (2) (84 S. E. 132).

Evidence in action against church trustees for price of organ, as to reason why original contract was made with choir association and not with church was properly excluded. 145/604 (1) (89 S. E. 698).

Not error to reject evidence in action for breach of contract to purchase goods showing that defendant had previously purchased from plaintiff similar goods under different contract, and that there had been delay in delivering them, whereby defendant suffered loss. 145/836, 837 (8) (90 S. E. 61).

Where, in suit for purchase price of building materials alleged to have been bought on open account, plaintiff's proof showed that materials were sold, not to defendant, but to her contractor, and that after sale defendant orally promised to pay for them, it was not error to exclude, on motion of defendant, evidence relating to her promise to pay, on ground that such evidence was at variance with and not authorized by allegations of petition. 22 App. 79 (1) (95 S. E. 310).

Identity: None of the remedies provided by this section is available to vendor unless there has been identification of subject of sale. 18 App. 184 (2) (89 S. E. 177).

Jury: In action for breach of contract to purchase seed, question whether seed were in "well-cleaned and merchant-

able condition" was for jury. 15 App. 353 (4) (83 S. E. 276).

Notice: Telegram reading, "Your failure to give specifications and shipping instructions on your contract for bags forces us to dispose of the raw material covering same in New York open market for your account unless you direct immediate sale we will sell gradually on favorable market for your account," was sufficient notice of intent of vendor to sell at vendee's risk. 23 App. 598 (99 S. E. 167).

Petition in action by indorsee of note given for purchase-money of land, of which vendor kept possession, to subject land to debt was not demurrable. 142/424 (1) (83 S. E. 93).

Allegations in amendment to petition, in action for breach of contract under which millowner agreed to sell to buyer all stovewood manufactured in its sawmill, held not subject to demurrer. 16 App. 636, 637 (3) (85 S. E. 943).

Petition alleging plaintiff's sale to defendant of "from 1,500 to 2,000 green salted hides, 30# and up," that sale was confirmed by parties, that plaintiff at defendants' instance delayed shipment for a time, that defendant notified plaintiff that he refused to take and pay for such hides, that plaintiff after notice resold hides in good faith and for a certain amount, and incurred expenses, and asking judgment for difference between contract price and proceeds and expenses, was not demurrable. 24 App. 581, 582 (4-a) (101 S. E. 706).

Count of petition in seller's action for difference between contract price and proceeds of resale of hides, for expenses, etc., alleging resale after buyer's notice that it would refuse to receive and pay for them, defendant's subsequent order of certain number of hides and his refusal to take them and a resale thereof and seeking judgment for difference, etc., was defective and demurrable, as showing waiver. 24 App. 581, 582 (4-b) (101 S. E. 706).

Price: Where buyer refused to make payments or give notes called for by sale contract, or to accept the property, seller's remedy is for breach of contract, not for the purchase-money. 143/581 (1) (85 S. E. 856).

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Judgment for plaintiff here in action to recover for breach of agreement to pay as part consideration for sale note which plaintiff had indorsed was proper under the law and facts of the case. 145/872 (90 S. E. 50).

As between original seller and original purchaser, agreed price as stated in contract is *prima facie*, but not conclusive, evidence of the actual value of the property, and on proof of the contract, in the absence of rebutting testimony as to value, plaintiff is entitled to recover balance due thereon. 24 App. 683 (5) (102 S. E. 44).

Printing: Failure and refusal of purchaser to give directions as to what they wished printed on fertilizer bags which were to be delivered in installments under an entire contract of purchase which recited "printing usual," after being called upon twice so to do, was breach of entire contract and authorized the seller, on notice to the purchasers, to sell the bags to others. 23 App. 598 (99 S. E. 167).

Where contract for purchase of fertilizer bags recited "printing usual," it was incumbent on purchasers to give directions as to what they wished printed on the bags before time for delivery of first shipment. 23 App. 598 (99 S. E. 167).

Reject: That seller, after shipping goods, wrote buyer that he would draw for money at time earlier than that specified in contract, did not justify purchaser's refusal to accept goods. 17 App. 643 (87 S. E. 921).

Remedies provided in this section are not exhaustive, and do not preclude pursuit of different remedy by seller, when none of three methods of procedure mentioned is available, in dealing with purchaser who refuses to accept and pay for goods bought. 18 App. 184 (1) (89 S. E. 177).

Renunciation: Where prior to time for delivery purchaser notifies seller that he will not take and pay for goods, seller may treat contract as rescinded and sue for damages sustained up to time of repudiation. 13 App. 551 (79 S. E. 485).

Where petition shows that by one contract plaintiff agreed to deliver to defendant fifty tons of cottonseed at stated price, and, by subsequent con-

tract with defendant, obligated himself to furnish fifty tons of cottonseed at an agreed price, each of the contracts must be construed as entire, and no compliance with either contract is shown where petition avers that seller tendered under one forty-one tons and under other fifty-four tons; hence, provisions of this section do not apply. 19 App. 411 (1) (91 S. E. 572).

Where defendant buyer countermanded order for goods several months prior to delivery to carrier, and wrote letter to seller cancelling the order and notifying seller that buyer would not accept the goods, remedy of seller was by suit for breach on contract or by pursuing one of the remedies pointed out in this section. 21 App. 774 (5) (95 S. E. 265).

When contract for sale of goods is executory on both sides, notice by purchaser to seller that he will not accept and pay for goods amounts to breach of contract; thereafter seller can not deliver goods to common carrier, consigned to buyer, and, having done so, treat contract as executed on his part, by suing buyer for purchase price of goods sold and delivered, but remedy is an action to recover damages for breach of contract. 23 App. 574 (99 S. E. 48).

Where contract of purchase and sale of goods was executory on both sides, notice by purchaser to seller to cancel purchaser's order was breach of contract, and seller could not by attempt to deliver the goods treat contract as performed on his part and sue purchaser for full purchase price. 23 App. 633 (1) (99 S. E. 138).

Resale: Before vendee will be liable for difference between contract price and price on resale, it must appear that he was notified of vendor's intention to resell at vendee's risk. 140/332 (1) (78 S. E. 1074).

Fact that vendor tendered the goods and that vendee refused to accept them is no reason why notice of resale by the vendor at the vendee's risk should not be given. *Id.* 332, 333 (1-b).

Where company refused to accept meat bought the seller was authorized to sell the same for the buyer's

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account, after reasonable notice of intention so to do; what will constitute reasonable time is question for the jury. 142/429, 431 (5) (83 S. E. 207).

Where defendant seller, in its plea of set-off, elected to rely on measure of damages specified in this section, evidence that buyer's failure to take automobile placed on seller necessity of selling car again at an expense was properly excluded. 16 App. 470 (2) (85 S. E. 677).

Where property bought has been rejected and resold by vendor, measure of damages is difference between contract price and price on resale. *Id.*

Where buyer, after accepting goods for several months, notifies seller that he will not complete contract, and seller gives buyer notice and resells remaining goods at market price, measure of damages is difference between original price and price at which goods were resold. 16 App. 636, 638 (4) (85 S. E. 943).

Notice of intention to resell is essential to exercise of such right by vendor. 18 App. 184 (2-b) (89 S. E. 177).

Remedy of resale is applicable to cases of executory contract where seller tenders performance, and where, before time fixed for delivery, purchaser notifies seller that he will not receive and pay for goods if tendered at that time. 24 App. 581 (1) (101 S. E. 706).

Before purchaser would be liable for difference between contract price and that obtained on resale, it must appear that he was notified of seller's

intention to resell at purchaser's risk. 24 App. 581 (1) (101 S. E. 706).

Whether seller, who, upon purchaser's refusal to take and pay for goods bought, elected to resell and recover difference between contract price and that obtained on resale, exercised reasonable diligence to sell within reasonable time and at best price he could obtain is question for jury. 24 App. 581 (2) (101 S. E. 706).

When considered in connection with allegation of petition in seller's action to recover difference between contract price and proceeds of resale by him that "said sale and purchase were confirmed in writing by plaintiff and by the defendant," statement of alleged contract of sale is not of a mere offer, proposal, or unilateral agreement, nor of an executed contract of sale, but of an executory contract for sale of goods to be delivered in the future. 24 App. 581, 582 (3) (101 S. E. 706).

Selection: Count of petition seeking recovery of expense of selling three cars of roofing, which had been arbitrarily selected by vendor without regard to purchaser's right to select roofing of such kind and price as it desired, was properly stricken. 18 App. 184 (2-a) (89 S. E. 177).

Substantial compliance: Provision in contract that weights of cottonseed sold were to be guaranteed by seller and would operate as express warranty of correctness of weights, but would not relieve seller from substantial compliance with terms of contract. 19 App. 411 (3) (91 S. E. 572).

§ 4134. (§ 3554.) Bill of lading with draft attached.

Stated. 144/175 (2) (86 S. E. 550).

Acceptance: Where person buys upon his personal credit and not for cash, he need not accept property when shipped with draft attached to bill of lading. 14 App. 47 (2) (80 S. E. 21).

Bona fide holder: Where agent of railroad company receives for shipment a number of bales of cotton, weighs them, and inserts in bill of lading number of bales and their total weight, and number of pounds inserted is in excess of actual weight, and shipper attaches to bill of lading a draft, which is paid by innocent transferee, railroad is

bound by error of agent, unless amount erroneously inserted in bill of lading is so very large that error would be apparent upon its face. 20 App. 761 (93 S. E. 286).

Delivery: Title to goods shipped to consignee's order, with draft attached to bill of lading, did not pass to drawee, who refused to take goods or pay draft. 15 App. 377 (83 S. E. 504).

Bill of lading may be transferred by delivery. *Id.*

Where consignor, who, being notified that consignee would not accept goods, sold same to plaintiff, went to bank

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and took up draft and bill of lading, title passes to plaintiff. *Id.*

Where owner of goods delivers them to railroad company, and bill of lading is issued to owner, in which he is named as both shipper and consignee, and which contains direction to "notify" a third person, it is duty of company, unless otherwise instructed by owner or by some holder of bill of lading properly indorsed, after transporting goods to destination, to make delivery to holder of bill of lading or one duly authorized by holder to receive same; company is not authorized by holder to deliver to person designated to be notified, to whom bill of lading has never been assigned, and such a delivery would amount to conversion. 148/851, 852 (3) (98 S. E. 541); reversing 21 App. 753 (95 S. E. 263).

Where one ships to another shingles and forwards by mail to consignee bill of lading, and makes draft for half the purchase price, under agreement that consignee shall pay such amount on receipt of bill of lading, and that remainder shall be paid after inspection of shingles, and consignee receives bill of lading but fails to pay draft, and transfers to third person property described therein, and that person, for value, transfers property to another, who purchases in good faith and with no notice of defect in title or of fraud on part of original consignee, action of trover can not be maintained against last named purchaser. 18 App. 658 (2) (90 S. E. 356).

Forgery: Drawee who has paid draft to which forged bills of lading were attached has no recourse against bank which had discounted the draft in ordinary course of business and without knowledge of the fraud. 20 App. 242 (1) (92 S. E. 968).

Indorsement: Bank to which draft with bill of lading attached is indorsed to be placed to indorser's credit on his general account, acquires title to goods represented by bill of lading, which can be asserted against lien of subsequent attachment creditor of consignor. 140/266 (2) (78 S. E. 1071).

Fact that after bank had acquired title the consignor wrote letters seek-

ing to induce person to be notified to accept and pay for the goods, and others seeking to make disposition of the goods, would not affect title of the bank, which had not received reimbursement to cover advancement made to consignor. *Id.* 266 (2-a).

Indorsement by bank of words, "All prior indorsements guaranteed, pay any bank or banker, or order," entered upon draft to which forged bills of lading are attached but which contains no reference to them, implies no guarantee of the genuineness of the bills of lading. 20 App. 242 (3) (92 S. E. 968).

Intention: Shipper, by consigning goods to his own order and attaching to bill of lading draft for price of goods, indicates intention to retain title until draft is paid. 15 App. 142 (2-a) (82 S. E. 784).

Loss: Where cotton sold is burned prior to payment of draft attached to bill of lading buyer can not sue railroad company whose negligence caused fire, though he has paid draft before instituting suit. 144/175 (3) (86 S. E. 550).

Plaintiff buyer in action for damages to cotton bought, by fire started by railroad company, must recover on strength of own title. 144/176 (86 S. E. 551).

Where it was not shown that plaintiff had paid draft, with bill of lading attached, before fire, not error to direct verdict for defendant. *Id.*

Order-notify shipment: Consignee of freight on "order-notify shipment," who has paid draft attached to bill of lading and owns goods shipped, can not, by refusing to accept the goods, avoid the payment of freight and demurrage charges due carrier. 22 App. 403 (1) (95 S. E. 997).

Where "order-notify" bill of lading required surrender of original order bill of lading, properly endorsed, before delivery of property, and shipper, by mistake, sent original bill of lading, instead of memorandum bill, direct to "order-notify" party, unendorsed, and memorandum bill, endorsed by shipper, was attached to draft on "order-notify" party without carrier's knowledge, and carrier delivered property upon surrender of original bill, unendorsed,

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carrier breached its contract to shipper and became liable to it in damages for value of property, the "order-notify" party having become bankrupt and never having paid purchase-price. 23 App. 309, 310 (5) (98 S. E. 106).

Payment: Where bank sends to correspondent bank draft, with bill of lading attached, for collection, and drawee has no general deposit with collecting bank sum more than sufficient to pay draft, and instructs bank to pay same, which it agrees to do by charging draft to his account, and surrenders to drawee bill of lading attached to draft, transaction constitu-

tes payment as between drawer and drawee, although collecting bank was insolvent, insolvency being unknown to drawee, and, so far as appears, unknown to officials of bank at time. 18 App. 377 (89 S. E. 454).

Title: Buyer of goods shipped with bill of lading attached to draft was not concerned in loss of part of shipment until it had paid draft and secured transfer of bill of lading by indorsement. 17 App. 42 (1) (86 S. E. 402).

Warranty: Bank, in cashing draft, without notice or suspicion of wrong-doing, does not warrant to the acceptor bills of lading attached to the draft. 20 App. 242 (2) (92 S. E. 968).

§ 4135. (§ 3555.) Implied warranty.

1.

Evidence: In sale of personal property there is implied warranty (unless expressly or from nature of transaction excepted) that seller has valid title

and right to sell; evidence here showed that implied warranty was not excepted in sale of property in question. 18 App. 776 (90 S. E. 727).

2.

Bill of lading: Bank which purchases bill of lading and makes draft on consignee is not liable on implied warranty of goods nor subject to attachment of proceeds of draft where consignor is insolvent. 24 App. 320 (2) (101 S. E. 6).

Copper wire: Where contract for sale of copper wire for electrical purposes specified its diameter and its conductivity, there was an implied warranty that it was properly constructed wire of the size and amount specified and reasonably suited for use. 142/464 (1) (83 S. E. 138).

Engine: Striking of plea in action on notes given for purchase price of tractor-engine alleging that plaintiff had promised that he would remedy trouble, and that in reliance on such promise defendant had given the notes, and that the engine was wholly worthless and not suited for purposes for which it was bought, etc., was error. 21 App. 717 (94 S. E. 901); 23 App. 791 (99 S. E. 541).

Evidence: Where vendor of personalty took from vendee promissory note for purchase price, note being secured by mortgage which stipulated that vendor

guaranteed the property only as to title, it was not competent to show by parol evidence that at time of sale vendor warranted that property was in first class condition and suitable for purpose for which it was intended, guaranteeing same for twelve months and that there would be no defect on account of workmanship or material during such period. 146/46 (90 S. E. 381).

Failure of consideration: Where goods are purchased under implied warranty that they are reasonably suited to uses intended, and are accepted by purchaser, he will be precluded from pleading, in action for purchase price, a partial failure of consideration, growing out of patent defect in the goods, or latent defect which, by exercise of ordinary care and prudence, might have been discovered before the sale. 22 App. 677 (97 S. E. 95).

Organ: Contract definitely specifying parts of pipe organ, and specifying exactly what seller was to do toward assembling parts, did not bind seller to furnish organ which would play, where articles other than those purchased were essential to accomplish-

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ment of such result. 15 App. 130 (82 S. E. 765).

Pleading: Allegations of items of damage in action for breach of implied

3.

Waiver of all warranties, express and implied, includes waiver of latent de-

warranty of goods sold should be specific as to stoppage of business and resulting loss. 142/464, 465 (3) (83 S. E. 138).

fects in article purchased. 18 App. 25 (1) (88 S. E. 745).

General Note.

Charge: Express warranty being confined to the age and soundness of a mule for which note was given, and plea that mule was purchased as a plow mule and was worthless as such, was supported by evidence, not error to charge that defendants had right to rely upon either an express warranty or an implied warranty. 13 App. 171 (1) (78 S. E. 1100).

Charge to jury to look to evidence in case and see whether or not machinery sold was free from stated defects at time of delivery, and, if so, it would be jury's duty to return verdict for plaintiff, was erroneous, in that court failed to tell jury that defects, if any existed, must be specific defects stated in defendant's plea; charge was also misleading in that it instructed jury that burden was on plaintiff to show that machinery was free from stated defects, when, as matter of law, burden was upon defendant to sustain plea by showing that defects therein alleged did exist. 23 App. 761 (2) (99 S. E. 312).

Under note of presiding judge attached to motion for new trial, certifying that there was no request to charge as to implied warranty, and that counsel for defendant did not urge implied warranty in trial of case or in argument to jury, but relied upon express warranty and total failure of consideration, court did not err in confining charge to sole defense set up in plea, to wit, alleged breach of alleged warranty therein set forth. 18 App. 317 (2) (89 S. E. 344).

Damages: Charge that where, by breach of contract or negligence, one is injured, he is bound to lessen damages as far as practicable by use of ordinary care and diligence; "that is, if defendant in this case discovered that article sold was of inferior value, it was

his duty to do everything possible to overcome defects at as little expense as possible," was inaccurate and misleading, in that it instructed jury that they could consider general value of article sold and were not restricted to consideration of specific defects alleged in defendant's plea. 23 App. 761 (3) (99 S. E. 312).

Description: Where foundry enters into contract with manufacturer of patented hay-press to furnish 500 sets of hay-press castings, and in the contract is a clause in which the foundry agrees to "furnish properly all castings needed by the undersigned [the manufacturer of the hay-press], whether of the exact pattern now used or not," this clause is not warranty of particular goods to be furnished, both as to kind and quality. 21 App. 23 (1) (93 S. E. 527).

Where, in promissory note given for purchase price of mule, description of mule was followed by words, "Above property not being guaranteed," the word "guaranteed" must be taken as synonymous with "warranted;" and this provision not being limited, and being express refusal to warrant, to exclusion of implied warranty, no defect in mule could be pleaded by way of defense. 21 App. 159 (1) (93 S. E. 1021).

Express warranty: Fact that memoranda giving estimate of quantity of various crops embraced in contract of sale were in writing did not constitute express warranty. 144/85 (86 S. E. 225).

Express warranty excludes an implied warranty on the same or closely related subject, but not an implied warranty on an entirely different subject. 13 App. 171 (1) (78 S. E. 1100).

Implied warranty can never be relied upon by buyer, where seller ex-

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pressly limits obligation as to warranty. 14 App. 84 (80 S. E. 341).

Defendants can not set up as defense to action for price of goods breach of any warranty other than that embraced in contract of sale. 14 App. 172 (2) (80 S. E. 704).

Where defendants rely upon express warranty, they can not defend upon proof of implied warranty. *Id.*

Express warranty descriptive of particular article sold not include implied warranty that articles are merchantable, and so free from inherent defects as not to be worthless or unsuited for other ordinary uses. 14 App. 333, 334 (6) (80 S. E. 864).

Provision in contract for sale of horse that seller did not warrant health or soundness but only title thereto did not exclude implied warranty that horse was reasonably suited to use intended. 15 App. 62 (1) (82 S. E. 633).

The words "but only the title thereto" limited extent of seller's refusal to warrant to things named and did not waive warranty implied by law. *Id.* 62 (3).

In written contract of sale, writing may express warranties, excluding certain warranties which statute implies; if it omits to do so law implies that seller warrants that he has valid title and right to sell, that article is merchantable and reasonably suited to use intended, and that he knows of no latent defects. 145/200 (3) (88 S. E. 954); 18 App. 179 (89 S. E. 79).

When parties have reduced to writing what appears to be complete and certain agreement, importing legal obligation, it will, in absence of fraud, accident, or mistake, be conclusively presumed that writing contains whole of agreement between them; and if it contains express warranty of certain qualities in articles sold, implied warranty of other qualities is excluded. 20 App. 313 (1) (93 S. E. 74).

Charge upon implied warranties is not authorized by pleadings, where defendant's plea is based solely upon alleged breach by plaintiff of certain alleged express warranties, and conceding that all implied warranties were not excluded by such express war-

rancies. 23 App. 761 (1) (99 S. E. 312).

Where, in defense to suit for money alleged to be due for personal property sold under express warranty as to quality, an express warranty was pleaded, it was error for court to charge on subject of implied warranty. 23 App. 803 (99 S. E. 537).

Law of implied warranty has no application to case where property was sold under contract of express warranty. 19 App. 512, 514 (91 S. E. 1003).

Where, in instrument in form of note and mortgage for purchase price of mule, it is stated that purchaser agrees to pay for mule if it should die, and that he assumes this risk in consideration of credit extended, and purchases on his own judgment, he is not, upon death of mule, entitled to prove express warranty of soundness, and defeat purchase price on account of breach of such warranty. 23 App. 394 (98 S. E. 357).

Infringement of patent: Mere notice by third party of his claim that article purchased infringes patent owned by him is not of itself an eviction of the purchaser, so as to show breach of seller's implied warranty of right to use. 20 App. 474 (1) (93 S. E. 155).

Knowledge: Where one orders an article described only by a name importing no particular quality, and the article proves to be unsuited to use for which it was represented by seller to be suitable, purchaser is not bound, unless at time of purchase he had knowledge of the real quality. 13 App. 512 (6) (79 S. E. 381).

Land: See § 4192 et seq.

Opinion: Representations which merely express seller's opinion do not constitute a warranty. 144/85 (86 S. E. 225).

Evidence here conclusively showed that statement furnished by seller was mere estimate, known and accepted as such by buyers, and that no warranty was intended. *Id.*

Parol: Where written contract of sale expressly excluded any warranty of health of mule sold, parol evidence was inadmissible to vary terms of contract. 14 App. 84 (1, 3) (80 S. E. 341).

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Petition by consignee in attachment suit by Georgia commission company against an Indiana national bank, owner of bill of lading, did not state cause of action against bank as on warranty of goods purchased by plaintiff, or entitle consignee to judgment in rem against its funds in hands of garnishee. 24 App. 320 (2) (101 S. E. 6).

Place: Warranty that cantaloupes "to be shipped" are "free of split ends and not overripe" is complied with where melons are in warranted condition when delivered to railroad. 15 App. 614 (1) (84 S. E. 90).

Pleading: Suit for breach of warranty of mule here was based on express, and not implied, warranty. 142/496 (1) (83 S. E. 126).

Where note given for purchase price of mule recited that purchaser bought animal after full inspection of same, that it was received in good order, and that he had purchased on his own judgment, and without any warranty and without representation, which was not fully set forth in the note, and the only representation in the note was that the mule was "one black mare mule about six years old, about 15 hands high, weight 1084 lbs., fresh shipped," plea setting up fraud in procurement of note in substance stating that fraud consisted of express false representations, made at time of sale, and known by seller to be untrue, that animal was sound and healthy, was not good plea in law. 20 App. 776 (93 S. E. 310).

Plea in affidavit of illegality in proceeding to foreclose chattel mortgage securing note that one of the mules delivered to vendee was returned to the vendors who accepted said mule, took possession of him, and that in a few days he died in their possession, and asserting that there was a total

failure of consideration in so far as value of said mule was concerned was a good plea of rescission, and fact that pleader denominated it as plea of failure of consideration did not defeat the plea not its effect. 23 App. 393 (98 S. E. 365).

Possession: Defects in machinery purchased were no ground for defense to action on notes for purchase money, where written agreement between parties made at time of execution of notes provided that no complaint should be made by purchaser after being in possession of machinery thirty days, and he was in possession for such period under the contract, and it did not appear that he made any complaint during that time. 23 App. 426 (1) (98 S. E. 405).

Waiver: Where buyer of mule voluntarily signed contract for its purchase, with knowledge of its terms, one of which was that seller warranted property against defects specifically noted only, and that no warranty of either party should form any part of contract unless set forth therein, and no defect was specifically noted in the contract and it contained no warranty other than as stated above, as to the property, doctrine of implied warranty was not applicable, and purchaser waived all defects in the property. 19 App. 511 (1) (91 S. E. 921).

Written contract: Where written contract of sale provided that property "is sold without any guarantee as to its kind or quality, and is purchased by the maker of this obligation with the understanding that no warranty shall be implied as against the seller," court erred in overruling timely motion of defendant to rule out plaintiff's testimony, "I said you guaranteed this mare to me, and I expect you to take care of it." 20 App. 488 (2) (93 S. E. 116).

§ 4136. (§ 3556.) Effect of breach.

Cited. 17 App. 779, 782 (88 S. E. 703).

Abatement: Where, in action for price of bank fixtures, defendant claimed a reduction because the fixtures were not according to contract, burden was on him to show the extent of the reduction. 141/370 (1) (81 S. E. 127).

Where defendant's evidence authorized a reduction of \$30.00 or \$40.00, it was not error to deduct \$40.00 from the price and direct a verdict for plaintiff for the balance. *Id.* 376, 377 (2).

Where mortgage recited that purchase money note was given for mule

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bought after full inspection by buyer, who received same in good order, and agreed to pay therefor "although it may die," and that "loss, * * of said property * * shall in no way abate payment of note or any part thereof," the buyer purchasing without any warranty, court did not err in striking affidavit of illegality in which it was attempted to set up an express warranty. 18 App. 506 (89 S. E. 599).

Plea in suit on unitemized account that plaintiff contracted to sell defendant an article called "special," and that plaintiff knew that the same was being bought for resale, and represented that the sale of said "special" was not prohibited by law, and same was not a substitute for beer, etc., whereas it was manufactured and intended as a substitute for beer, etc., which facts plaintiff knew and defendant did not know, was not subject to demurrer. 20 App. 105 (1) (92 S. E. 548).

Charge: Failure to charge that if jury found that use of engine was not worth more than payment defendant had made on it, and that defendant had tendered it back for the notes sued upon, then, if they believed from evidence that engine was not reasonably suited for uses intended, they should find for defendant, was not error. 146/232 (91 S. E. 28).

It is not reversible error to instruct jury as to law of express warranty, where purchaser relies also on implied warranty merely coextensive with express warranty as set up by answer of defendant and by his evidence. 20 App. 313 (1) (93 S. E. 74).

Where no proper and timely written request therefor was made, court did not err in failing to define words "express warranty" and "express contract of warranty." 22 App. 199 (2) (95 S. E. 737).

Construction: Statement in written contract for sale of mule that it is "about ten years old" will be regarded as express warranty that animal is about that age, and where same contract contains express warranty that the seller "does not warrant life, soundness, nor works of said mule, only the title thereto," both warranties should be construed together so as to reconcile all parts, and if this is impossible entire

warranty should be construed most strongly against party who prepared it and in whose favor it was made. 19 App. 166 (3) (91 S. E. 246).

Warranty in written contract for sale of mule that it is "about ten years old," and warranty that seller "does not warrant life, soundness, nor works of said mule, only the title thereto," construed together, mean that except that as to the fact that the mule was about ten years old, every other warranty as to its kind or quality was excluded, as well as all implied warranties as to soundness of the mule, etc. 19 App. 166 (3) (91 S. E. 246).

Disease: Where witness specifically described symptoms of two diseased horses question of similarity of symptoms was for jury. 143/44 (4) (84 S. E. 116).

Warranty of seller that animals are sound relates to their condition at time and place of sale, and covers any unsoundness then existing, though it may not become apparent until such subsequent time as is necessary to manifest existence of disease. 14 App. 540 (1) (82 S. E. 607).

Estoppel: Stipulation in note sued on that seller of horse would not warrant soundness did not preclude defendant from showing that seller had warranted soundness of another horse given in exchange for one for which note was given. 14 App. 218, 219 (2) (80 S. E. 536).

Evidence: Testimony of plaintiff's witness that he could have used improved machinery sold defendant, but that he was not asked to do so, should have been excluded, where there was no duty on defendant to make such a suggestion. 143/210, 211 (5) (84 S. E. 455).

Fraudulent representation: Where express representations constituting part of contract are made by seller as to existence of fact, in contradistinction to statement of mere opinion or judgment, purchaser ordinarily has right to rely thereon. 19 App. 401, 410 (5) (91 S. E. 579).

Insurance: If, when sale of policy of insurance was affected, vendor, by her agent, expressly stated that unexpired term extended for four and a half years, and accepted payment on that

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basis, purchaser had right to rely upon that statement as forming part of contract of purchase, it being shown that seller retained possession of policy, and it not appearing that policy was present at the time. 19 App. 401, 410 (5) (91 S. E. 549).

Intoxicating beverage: It was error to exclude bottles of "Maritana," together with caps and labels thereon, introduced in evidence by defendant, where labels contained statement, "Contents 12 oz. Alcohol about 4.25%," such bottles, together with caps and labels, being identified by defendant and by manager for plaintiff, as being same brand of goods as those sued for, one defense being that goods sued for were malt, alcoholic, and intoxicating liquors, sale of which was in violation of penal statutes. 21 App. 264 (2) (94 S. E. 282).

Land, breach of warranty of: See sections 4192-4197 and notes. Measure of damages. See section 4400 and notes.

Machinery: Defendant in action for machinery sold who set up certain defects as breach of warranty was not entitled to verdict in his favor, unless jury should find that there were defects as set forth in defendant's plea, and which would constitute a breach of express warranties relied upon by defendant and stated in his plea, and which had caused damage to defendant equal to or greater than balance of purchase-money sued for. 23 App. 761 (4) (99 S. E. 312).

Measure of damages: Under implied warranty that mules bought were free from contagious diseases, buyer could recover expense of treating mules affected with glanders and for maintaining them in quarantine, but not expense of keeping his labor in shape to continue his business until spread of disease was stopped. 142/131, 132 (1) (82 S. E. 440).

Where an automobile was kept and used by the purchaser for several months before being returned to the vendor, the measure of damages, in suit by the purchaser against the vendor for the purchase price, was the difference between the purchase price and the market value on the day the automobile was purchased. 19 App. 207 (91 S. E. 427).

Where automobile delivered by seller does not correspond with automobile sold with warranty of quality, measure of damages is difference between contract price and actual value of automobile when and where delivered. 23 App. 275 (1) (97 S. E. 882).

Notice: Charge that as matter of law seller's agent had waived its right to written notice of defect from buyer was erroneous, question being for jury. 16 App. 457 (1) (85 S. E. 613).

Where warranty of roofing provided that notice of defect should be given in writing, and it was conceded that no notice was given or waived, breach of such warranty was no defense in action on contract for material furnished and labor performed. 17 App. 523 (1) (87 S. E. 825).

Where buyer of ice-making machinery failed to give notice to seller that such machinery did not fulfill terms of contract, which provided that in absence of such notice the machinery should be held to meet terms of contract, such seller could not set up as defense that the machinery would not manufacture within twenty-four hours the amount of ice warranted, etc. 20 App. 695 (1) (93 S. E. 279).

Where in sale of machinery there is express warranty as to quality, and by terms of warranty liability of seller is predicated upon conditions which must be performed by buyer, and, upon its failure to fulfill the warranty, give written notice at once to seller at designated place, and also to agent of seller through whom property was received, stating in what parts and wherein property fails to fulfill warranty, seller will not be held liable on warranty unless buyer complies with such conditions. 21 App. 512 (3) (94 S. E. 892).

Where answer sets up that defects complained of were latent and concealed, and were of such a character that their existence could not be ascertained within period allowed by contract for notice thereof to seller, but that seller, knowing of such defects and that they could not be discovered within such time, fraudulently concealed them from defendant, answer would not be subject to demurrer upon

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ground that notice within time provided for had not been given. 21 App. 512 (4) (94 S. E. 892).

Parol: Where purchase-money note for mule is unambiguous and unconditional, and contains no warranty of soundness of mule, and recites that it has lost one eye, no express warranty can be added by parol; and plea which sets up express warranty, alleged to have been made by parol contemporaneously with execution of such note, that "the other eye of said mule was absolutely sound and all right," and that the mule soon thereafter became totally blind, was properly stricken on demurrer. 22 App. 712 (97 S. E. 96).

Plea averring that note sued on was given in payment of price of certain diamond rings, that part of consideration was guarantee that rings should weigh certain number of karats, that such weights were warranted by plaintiff, and that on faith of this warranty defendant bought the rings, sufficiently indicated that guarantee as to weights was made before purchase and not thereafter, and that alleged false representations as to weights induced the purchase. 19 App. 125 (1) (91 S. E. 214).

Plea setting up warranty that mule is "about ten years old," and alleging that it was in reality about twenty-five years old can be construed to be an attack upon the truth of the express warranty. 19 App. 166 (3) (91 S. E. 246).

Reject: Where there was contract for sale of onion sets, and portion was delivered, paid for, and used, purchaser cannot rescind on ground that quantity received and accepted by him was inferior in quality to that stipulated in contract. 145/559 (2) (89 S. E. 486).

Plea in action on note given for purchase price of goods not alleging that defendant did not retain property after thirty days from date of shipment, the contract expressly providing that such retention should constitute an acceptance, be conclusive admission of all representations made by the seller, and void all its contracts of warranty, set up no defense. 21 App. 634, 636 (1-b) (94 S. E. 897).

Court did not err in charging in trover suit that if jury found that machine in question was delivered to defendant, that if defendant had the machine tested and accepted the same, and that he subsequently gave notes for payment of amount in question, he could not be heard to complain that machine was not suited for purpose for which it was intended, or that it did not produce merchantable products. 24 App. 683 (2) (102 S. E. 44).

Renewal: Where mule was sold with warranty of soundness, renewal of warranty was unnecessary to its enforcement for a breach. 142/659 (3) (83 S. E. 523).

Rescission: Where party contracts for property of specific kind and character, and property of different kind and character is tendered, party may treat contract as at an end and have his action for recovery of such part of purchase price as he may have paid at time of making of contract; in such case he is not required to accept the property and sue for a breach of the contract. 20 App. 255 (1) (92 S. E. 1011).

Return: Evidence that defendant buyer returned mule bought and told plaintiff, who said that animal was sound, that it was lame, was admissible under answer here. 144/486, 487 (2) (87 S. E. 479).

Return of stallion was condition precedent to setting up defense of failure of consideration in action on note given for purchase price of stallion sold under guaranty. 19 App. 512 (91 S. E. 1003).

It was error to strike plea as to defendant's offer to return to plaintiff unsold goods shipped to defendant under contract attached to petition. 20 App. 206 (92 S. E. 1013).

Where contract of sale or return provided that filter and unused disks were to be returned for credit in good condition to seller within thirty-five days from date, if directions for use were followed and results obtained were not satisfactory, return should have been made within time expressly limited, and question of reasonable time did not enter. 22 App. 167 (1) (95 S. E. 736).

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Where contract of sale or return provided that goods sold should be returned for credit within certain time, if directions for use were followed and results obtained not satisfactory, mere notice by purchaser, given prior to expiration of time limit, that machine had proved unsatisfactory and that unless better results could be had it would be returned, can not be taken as compliance with contract. 22 App. 167 (2) (95 S. E. 736).

Where contract of sale or return provided that goods sold should be returned for credit within thirty-five days, if directions for use were followed and results obtained were not satisfactory, rights of parties became fixed upon expiration of time limit unless limitation imposed had been in some way extended. 22 App. 167, 168 (3) (95 S. E. 736).

Set-off: Defendant, in action for price of trees sold, could set off his damages from being compelled to pay notes in hands of innocent purchasers, given by defendant for trees previously bought, but not as warranted, though notes were paid after discovery of the breach. 13 App. 352 (1) (79 S. E. 212).

Where answer failed to state when notes were given, or to whom they were transferred, or to state facts from which it could be determined whether holder was an innocent purchaser, such answer was demurrable. Id. 352 (2).

Terms: On trial of suit on unconditional note reciting as consideration purchase of described personal property, but not purporting to integrate terms of sale, prior written agreement of parties, governing terms of sale, is admissible to rebut plea setting up breach of a verbal warranty, even though written agreement be not set forth in plaintiff's pleadings. 19 App. 716 (92 S. E. 235).

Title: Defendant buyer here was not precluded from recovering from plaintiff for failure to furnish sound animal in place of one delivered though contract of sale stated that there was no warranty except as to title. 144/486, 487 (2) (87 S. E. 479).

Verdict: Under instruction limiting jury to consideration of whether or not there was a breach of warranty "as contended for the plaintiff," jury were not authorized to find against defendants for defects not existing at the time the warranty was made. 20 App. 798 (2) (93 S. E. 541).

Waive: Instruction that acceptance would be waiver of previously discovered defects was erroneous here. 143/210, 211 (7) (84 S. E. 455).

Where sale contract waived all failure of consideration, no defects in horse for which note sued on was given could be pleaded in defense. 17 App. 448 (1) (87 S. E. 608).

Plea setting up undisclosed latent defect did not show such legal fraud as could be pleaded against written contract of sale, by which vendor declined to warrant soundness of horse. Id. 448 (2).

Where there was nothing in evidence to indicate that at time second note was executed by purchaser (about five days after first note had been given, and in lieu thereof), he had discovered that horse was diseased or worthless, the giving of the second note did not amount to a waiver of the defect complained of. 20 App. 798 (3) (93 S. E. 541).

Breach of warranty, express or implied, gives purchaser right to damages, and even though seller by his acts might have become liable for fraud as well as for breach of warranty, buyer may waive the fraud and sue upon the breach of warranty. 21 App. 440 (94 S. E. 628).

Water: Where petition alleged that warranty was that defendants would guarantee well to be constructed on plaintiff's farm to be a success, and plaintiff testified that no time was specified in the warranty, but it was to be long enough to prove that well would stay good and all right, and there was no further testimony as to time for which warranty was to continue, it was error for court to charge on theory that defendants represented that supply of water would be continuous and that they would keep well in good condition. 18 App. 323 (89 S. E. 350).

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§ 4137. (§ 3557.) **Acceptance, presumption of quality.**

Estoppel: Fact that purchaser afterwards gave notes for remainder of purchase price then unpaid would not prevent him from setting up, by way of recoupment, claim for damages based on alleged deficiency in weights of diamonds purchased, since damages arose out of original contract of purchase. 19 App. 125 (2) (91 S. E. 214).

Where defendant's testimony showed that notes given to plaintiff in settlement of balance due on open account for purchase price of diamonds were executed and delivered before defendant had discovered, or there had been brought to its attention, any reason to investigate, and before it had reasonable opportunity to discover breach of warranty as to weights of diamonds purchased, defendant was not estopped from setting up claim for damages because of giving of notes. 19 App. 125 (3) (91 S. E. 214).

Evidence: Error, in action for price of oil, to exclude written contract offered by plaintiff giving purchaser option to return unsatisfactory oil without charge for any amount consumed, where defendant admitted that oil was not returned pursuant to contract. 15 App. 107 (1) (82 S. E. 665).

Court did not err in declining to permit one of defendants to testify, in explanation of delay in inspecting articles sold upon their arrival at destination, that defendants held at that time a demand against plaintiff, growing out of former shipment under same contract, and that delay in inspecting shipment which was basis of pending suit, until adjustment of existing conditions had been reached, was for that reason not unreasonable. 20 App. 313 (3) (93 S. E. 74).

Inspection: Where law books were ordered by attorneys and placed on their shelves without examination, and installments on price paid for several months, no defense that books were not examined until part of price had been paid, when they were found unsuited for use in local courts, and that seller knew that defendants desired them for that purpose. 14 App. 189 (80 S. E. 550).

Provision in contract between plain-

tiffs and defendants, under which lumber was shipped to third persons on orders from plaintiffs, that "all shipments are made subject to inspection at destination, unless specifically specified to the contrary, and with the understanding that report as rendered by consignee shall be accepted as original evidence of such inspection," did not render such reports exclusive evidence, or conclusive as to the matter to which they related. 20 App. 215 (92 S. E. 964).

Court did not err in charging that it was duty of buyers, upon arrival of articles at their destination, to promptly inspect same and either accept or reject them, and if they delayed inspection for unreasonable time, that in law would amount to an acceptance, and if jury found that buyers delayed for unreasonable time in accepting articles after their arrival at destination, then buyers would be liable for such damages as sellers suffered by reason of rejection of the articles. 20 App. 313 (4) (93 S. E. 74).

Knowledge: Where purchaser agreed to inspect ties as they were delivered, and he had an opportunity to inspect them, if he discovered that they were not coming up to contract, it was his duty to have notified the seller of that fact. 140/592 (1) (79 S. E. 459).

Purchaser has right to rely on express warranty, and may plead total or partial failure of consideration on account of defects discovered after acceptance, though they would have been discovered by an examination before delivery. 13 App. 154 (1) (78 S. E. 1023).

Giving of note for purchase-price will not estop buyer from pleading failure of consideration, although note was given after discovery of defects, where seller promised to repair the same and failed to do so. *Id.* 154 (2).

If vendor delivered onion sets not in accordance with contract and this amounted to such substantial non-compliance with contract as whole, vendee might rescind and refuse to accept performance as to balance; but if, with knowledge of defects, he received and paid for goods, he could

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not rescind. 145/559 (3) (89 S. E. 486).

Where property is bought under implied warranty that it is reasonably suited to use intended, acceptance by purchaser waives all defects discovered by him, or which, by exercise of ordinary care and prudence, he might have discovered, before delivery. 22 App. 441 (96 S. E. 233).

Where a purchaser, notwithstanding his full actual knowledge of defects in article sold to him, deliberately promises in writing to pay therefor, he cannot thereafter set up a plea of failure of consideration based upon such defects. 21 App. 194, 196 (94 S. E. 83).

Plea in action on note given for purchase price of goods not alleging that defects were latent and concealed, and of such character that their existence could not be ascertained within thirty days, and that seller,

knowing of such defects, fraudulently concealed them from defendant, the contract providing that retention for thirty days should constitute acceptance and void all of seller's contracts of warranty, set up no defense. 21 App. 634, 636 (1-b) (94 S. E. 897).

Partial failure: Where defendant in action on note filed answer setting up partial payment and partial failure of consideration, and tender was made, denial of new trial was not error, as defendant knew what he had received when he made the partial payment and the tender, though plea of failure of consideration was stricken. 18 App. 629, 630 (1) (89 S. E. 1098).

Issue of partial failure of consideration, raised by defendant's plea here in action upon account for grapes shipped, under appropriate instructions from court, should have been submitted to the jury. 21 App. 666 (1) (94 S. E. 809).

§ 4140. (§ 3560.) **Patent defects.**

General warranty of soundness may cover patent defects if so intended. 14 App. 215 (1) (80 S. E. 680).

Charge that patent defects are not covered by general express warranty, unless intended to be covered, was correct. 24 App. 508 (1) (101 S. E. 201).

Notice: Charge that burden of keeping premises in repair is generally on landlord, but, if in any case tenants could recoup, as against the rent, damages from patent defects existing at time

of renting, and as to existence of which both parties had equal opportunities of informing themselves, he cannot do so, where landlord was not notified to repair or notified of a defect, was correct. 24 App. 508 (1) (101 S. E. 201).

Parol evidence to show that general express warranty of soundness was intended to cover patent defects is admissible. 14 App. 215 (1) (80 S. E. 680).

§ 4141. (§ 3561.) **Barter and exchange.**

Horse-swap: See § 4305, catchword **Horse-swap.**

Petition here in action for breach of contract to exchange land held erroneously dismissed on ground that it set forth no cause of action. 22 App. 484 (96 S. E. 333).

ARTICLE 2.

Of Gifts.

§ 4144. (§ 3564.) **Essentials of gift.**

Applied. 16 App. 387 (1) (85 S. E. 617).

Stated. 22 App. 366 (2) (95 S. E. 1005).

Charge: Evidence, in administrator's action to recover property as part of decedent's estate, authorized instructions as to essentials of gift under

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this section and section 4150. 14 App. 630, 631 (3) (82 S. E. 52).

Delivery is essential element of gift. 18 App. 185 (1) (89 S. E. 182).

Deposit: Where deposit-book issued by savings bank is delivered with appropriate words of gift by depositor, with intention to give to person to whom delivered the deposits entered in the book, there is a valid gift of such deposits, without assignment or transfer in writing. 23 App. 677 (99 S. E. 160).

Evidence here sustained verdict for defendants in action for injunction and recovery of certain lands, claimed by them under parol gift. 145/195 (2) (88 S. E. 931).

In action by purchaser against donee in possession under claim of parol gift, donee's testimony that she had stated to attorney for donor and vendor in his presence that she had an interest in property and that she would not vacate was material on issue as to gift. 147/547 (2) (94 S. E. 1007).

In action by purchaser to recover house and lot claimed by defendant as donee in possession under parol gift from vendor and donor, her husband, testimony of another, not a party, that she had married vendor and donor and had never been divorced was irrelevant and immaterial. 147/547, 548 (3) (94 S. E. 1007).

Evidence here was sufficient to show valid gift. 18 App. 182 (2) (89 S. E. 161).

Intention to give must be expressed. 18 App. 182 (1) (89 S. E. 161).

Not essential in every case that expression of intention to give be synchronous with delivery, for if it

not other purpose in delivery than to no other purpose in delivery than to effectuate definite intention expressed in past in anticipation of future delivery, delivery would complete the gift. 18 App. 182, 183 (5) (89 S. E. 161).

To make a valid gift there need be only a present intention to give and a complete renunciation of right by the giver over the thing given, and full delivery of possession as a gift. 18 App. 182, 183 (5) (89 S. E. 161).

Parol gift: Where one claims parol gift of land, he must show valuable improvements on faith of gift during donor's life to establish equitable title. 144/717, 718 (3) (87 S. E. 1030).

Gift of money represented by time certificate will not be defeated, if circumstances indicate that omission to reduce to writing evidence of transfer of legal title was due to ignorance, accident, or mistake. 18 App. 182, 183 (3) (89 S. E. 161).

Jury trying claim case is not required to find that personal property in dispute is not subject to levy, when claimant's title rests entirely upon proof of parol gift from her husband of personalty not shown to have been delivered to her, and which at time of alleged gift, as well as at date of levy, was in possession of another, acting as agent for the husband. 18 App. 185 (2) (89 S. E. 182).

Title: Where husband makes gift of a chattel to his wife and afterwards takes possession of the same, he cannot, in suit in trover brought by wife, set up title in third person at time gift was made. 13 App. 401 (79 S. E. 230).

§ 4145. (§ 3565.) Acceptance of gift.

Cited. 18 App. 185, 186 (89 S. E. 182).

Implied acceptance: Acceptance by donee, being generally presumed, may

be implied. 18 App. 182 (1) (89 S. E. 161).

§ 4146. (§ 3566.) Effect of written deed.

Consideration: Refusal of charge that promissory note under seal may be subject of valid gift, as between maker and payee, and needs no other or further consideration was not error. 23 App. 569 (1-a) (99 S. E. 57).

Title: After deed of gift to grantor's daughter in fee simple, subsequent deed, not made to correct mistake or change description, did not affect rights previously conveyed, though it provided that conveyance was to

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daughter and "heirs of her body after her death." 144/318 (2) (87 S. E. 22).

Where mother conveyed land to daughter and deed was recorded, and grantor later conveyed to same grantee the same land by deed of gift, reserving life estate as to portion of land, and there was attested entry on back of deed that on death of grantee without children title should revert to grantor's heirs, and grantee died intestate without children, property descended to her husband and not

to heirs of grantor. 145/448 (89 S. E. 410).

If husband buys land and causes deed to his wife to be executed by vendor, such conveyance will amount to gift of land by husband to wife, and will operate to vest title in her. 147/37 (1) (92 S. E. 863).

Where husband who bought land caused deed to his wife to be executed by vendor, mere fact of surrender of deed by wife to husband, and its destruction, will not operate to divest title of wife. 147/37 (2) (92 S. E. 863).

§ 4147. (§ 3567.) **Delivery.**

Applied. 16 App. 387 (1) (85 S. E. 617).

Stated. 22 App. 366 (2) (95 S. E. 1005).

Evidence: Though delivery of article given must be proved, it may be proved by circumstantial as well as direct evidence. 18 App. 182 (1) (89 S. E. 161).

Declarations of donor made after time of alleged gift, if admissible at all to disprove gift, are of little probative value if jury is convinced by competent evidence that donor intended to deliver and did actually deliver symbol of property which stood in lieu of the chattel, and merely omitted some formal act by which renunciation and transfer of ownership is usually effected. 18 App. 182, 183 (4) (89 S. E. 161).

Proof of language indicating parol gift of personalty, followed by conversations in which proposing donor used language to alleged donee confirmatory of alleged previous gift does not, without more, compel finding that there was even constructive delivery. 18 App. 185 (1) (89 S. E. 182).

Evidence that grandfather, whose grandchild lived in house with him, had stated that he had given to such

grandchild certain heifer, and heifer continued to remain on premises and in the lot of donor where both donor and donee resided, donee and his wife working for donor, is sufficient to authorize inference that subject matter of alleged gift was delivered to donee, and that donor parted with title and relinquishes all ownership over property, thereby constituting valid gift. 24 App. 174 (1) (100 S. E. 229).

Intention: Not essential in every case that expression of intention to give be synchronous with delivery, for if it be plain that there could have been no other purpose in delivery than to effectuate definite intention expressed in past in anticipation of future delivery, delivery would complete the gift. 18 App. 182, 183 (5) (89 S. E. 161).

Manual delivery: While delivery is essential to valid gift of personalty, actual manual delivery is not required. 24 App. 174 (1) (100 S. E. 229).

Possession: Mere fact that donee of personalty allows possession of property to remain with donor will not necessarily defeat the gift. 24 App. 174 (1) (100 S. E. 229).

§ 4150. (§ 3570.) **Presumption of gifts.**

Applied. 16 App. 387 (1) (85 S. E. 617).

Charge: Evidence, in administrator's action to recover property as part of decedent's estate, authorized instructions as to essentials of gift under

this section and section 4144. 14 App. 630, 631 (3) (82 S. E. 52).

Scope: This section applies only where there is a delivery, or where donee is in exclusive possession. 18 App. 185, 187 (89 S. E. 182).

Of title by escheat and forfeiture.

§ 4151. (§ 3571.) **Presumption of gift.**

Applied. 16 App. 387 (1) (85 S. E. 617).

Charge here, while objectionable, when standing alone, as not sufficiently stating the rule laid down in this section, was, when considered in connection with the entire charge, properly qualified. 140/380 (1) (78 S. E. 928).

Partial blending of this section and section 4634, though likely to be misleading, plaintiff in error here not injured, the only effect being to place a heavier burden on plaintiff than the law imposes. Id. 380 (2).

Consent of wife, before expiration of seven years, to purchase of small part of land by her husband from her father, while a circumstance to be considered, is not as matter of law, inconsistent with claim of gift, that she had not disclaimed title, and that there had not been a claim of dominion by

the father acknowledged by the donee. 140/380 (3) (78 S. E. 928).

Evidence to effect that alleged donor had said, in conversation with witness before buying land in controversy, that he wanted to buy a home for both his children, and that donor gave the land to the alleged donee, not objectionable as being irrelevant. 140/380, 381 (6) (78 S. E. 928).

Possession: Allegation of possession for statutory period is supported by proof of possession by donee for part of period and by her tenants for the remainder, even though one of the tenants was father of donee, where father actually paid rents to donee and recognized her as his landlord. 140/380, 381 (5) (78 S. E. 928).

Scope: This section applies only where there is a delivery, or where donee is in exclusive possession. 18 App. 185, 187 (89 S. E. 182).

§ 4154. (§ 3574.) **Donatio causa mortis.**

Applied. 16 App. 387 (1) (85 S. E. 617).

Certificate: Where intestate, having time certificate of deposit in bank, dated February 27, 1912, caused to be written thereon, "It is understood and agreed this deposit to go to E. and H. each an equal share, to be paid to them at the ages of 19 years, in case of the death of [intestate], without court proceedings whatever," and retained possession of such certificate, and de-

cedent personally collected interest due on certificate on July 13, 1912, and did not sign notation on certificate, and died unexpectedly, July 29, 1912, there was no gift in contemplation of death. 18 App. 418 (1, 2) (89 S. E. 492).

Creditors: As against rights of creditors, law with reference to gifts causa mortis is identical with law as to other gifts. 23 App. 677, 682 (99 S. E. 160).

CHAPTER 5.

Of Title by Escheat and Forfeiture.

§ 4160 (a). **No escheat in what cases.** [If there shall now or hereafter be any property in this State in the hands of an administrator or escheator to which the husband or wife or adopted child of the deceased was an heir, but such widow, husband, or adopted child, before receiving possession of said property, has died intestate in respect thereto and without ascertainable heirs, such property shall not escheat to the State, in case there be heirs of the blood of such deceased person, but shall be held

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to belong to the persons who would have inherited the same had such marriage or adoption not occurred.]

Acts 1917, p. 101.

§ 4160 (b). **Reduction of property to cash. Ascertainment of non-existence of person.** [Such property shall be reduced to cash by such administrator or escheator under existing laws; the non-existence of such wife, husband or adopted child, or of the heirs of the same, may be ascertained by advertisement as provided in case of escheats; and should such not appear, the fund shall be paid over, less the expenses of the proceedings, as above provided.]

Acts 1917, p. 101.

CHAPTER 6.

Of Title by Prescription.

§ 4163. (§ 3583.) Title by prescription.

Homestead: Fact that purchaser under deed of homestead had acquired title by prescription as against widow of homesteader, would not cause title by prescription to run against minor son of homesteader, it not appearing that prescription ripened prior to death of husband. 147/450 (94 S. E. 578).

Statute of limitations does not apply to action by heirs to recover land from daughter of deceased administrator who had held possession for twenty years and never administered it, defendant knowing the facts. 146/81 (90 S. E. 710).

§ 4164. (§ 3584.) Adverse possession.

Applied. 147/654, 656 (95 S. E. 211).
Cited. 143/497, 501 (85 S. E. 742).
Stated. 144/210 (1) (87 S. E. 7).

Abandonment of possession after prescriptive title has matured, not defeat title. 140/297 (4) (78 S. E. 846).

Actual possession: Actual adverse possession of lands under color of title for twenty years will give title by prescription against everyone, except the State and persons laboring under disability. 147/5, 6 (4) (92 S. E. 514).

Bond for title: Seven years bona fide adverse possession under bond for title with some purchase money unpaid gives good prescriptive title against everybody but obligor and his privies, though maker of bond has no title. 144/497 (2) (87 S. E. 665).

Charge that actual possession of property for period of seven years under color of title gives party a good title, did not sufficiently state essential provisions of this section, and con-

stituted reversible error. 147/498, 499 (5) (94 S. E. 759).

Continuous: Erection and occasional use of pen for cattle or hogs, ten feet square, on lot of wild land containing 490 acres, and using land at intervals as range for cattle, and cutting of small quantity of timber therefrom, by one who claims under color of title, is not such possession as affords basis for title by prescription. 147/55 (1-a) (92 S. E. 892).

Deed should be admitted in action involving title to land claimed by prescription when shown to cover any part of land in controversy, or should be rejected if such materiality is not shown. 146/439 (2) (91 S. E. 407).

Evidence: While a paper given by one in possession of a portion of land to another, who claimed it as a whole, agreeing to surrender it, would not amount to color of title on behalf of the latter, it would tend to show that the person so in possession did not

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hold adversely to such claimant. 141/27, 28 (3-a) (80 S. E. 461).

Evidence that mother's request that son be permitted to remain on land while he lived was communicated to persons interested, and that they therefore delayed suit, was admissible to show that the son's possession was not adverse. 143/7, 8 (5) (84 S. E. 58).

Evidence here was insufficient to demand finding that defendant had prescriptive title to land. 143/31 (2) (84 S. E. 55).

Where court, in complaint for land, confined issue before jury to one question which was controlling under the facts, namely, proof of bona fide, continuous possession by plaintiffs under their vendor's deed for seven years, etc., admission of documentary evidence of doubtful relevancy, such as annual return of administrator of intestate under whom defendant claimed as heir at law, certain deeds from predecessors in title, etc., was harmless error. 148/90 (1) (95 S. E. 994).

Execution sale: Possession of plaintiff in *fi. fa.*, acquired under a void sheriff's sale, did not constitute such adverse possession as would afford basis for prescription as against equitable owner. 142/237, 239 (2-b) (82 S. E. 649).

Fraud: Presumption of good faith arises from adverse possession, and direct evidence of bona fides is not required. 142/245 (2) (82 S. E. 662).

Where there was evidence that a prescriber, with whom defendant connected his claim of title, entered and held possession for the requisite period as grantee in a deed purporting to be based on a valuable consideration, it was not necessary that he prove good faith of the prescriber. *Id.*

Hostile possession of prescriber must be shown. 140/353, 359 (78 S. E. 906).

As long as person who is in possession of property of another, using same for owner's benefit, recognizes

latter's ownership, no lapse of time will bar owner from asserting his title as against person in possession. 149/475, 476 (4) (100 S. E. 635).

Notice: Before lapse of time will be bar to owner of land it must appear that person in possession has given notice, or there must be circumstances shown which would be equivalent to notice to owner that person in possession claims adversely to him, and statute begins to run from date of such notice. 149/475, 476 (4) (100 S. E. 635).

Permissive possession: This section does not mean that possession may not originate in permission, and telegraph company, which built its line over right of way of railroad company under parol license, by maintaining same for from 20 to 50 years under claim of right, acquired prescriptive right. 227 Fed. 276 (2).

Squatter: Mere squatter on lot of land, without color of title or claim of right, can not defeat title of true owner by conveying land to other persons who have full knowledge of nature and character of property, although they may have been in possession for seven years under such title. 146/362 (1) (91 S. E. 113).

Taxes: Where it was admitted that son of plaintiff's intestate, under whom defendant's intestate claimed, had paid taxes on land in dispute at a certain valuation, "as shown in the digest," State and county tax receipts to such persons were admissible on issue of adverse possession. 143/7, 8 (9) (84 S. E. 58).

Tax receipts shown to be for or to include taxes on a property in dispute are admissible, but receipts not shown to include payments are incompetent. *Id.*

Tenant: Possession of one as mere tenant of another will not afford him a basis for prescription. 142/237, 240 (2-c) (82 S. E. 649).

§ 4165. (§ 3585.) Actual possession.

Cited: 147/15 (2) (92 S. E. 531).

Charge: Where plaintiff's intestate was never in actual possession of land in dispute, and there was evidence to show that defendants and their pred-

ecessors in title were in actual possession during any period of plaintiff's constructive possession court, on request, should have charged that actual possession by one person claiming land

Of title by prescription.

is inconsistent with constructive possession of same land by another claimant. 148/721, 723 (8) (98 S. E. 543).

Charge here was not erroneous in that it excluded from jury certain evidence of possession by occupancy and cultivation of particular parts of land in dispute included within general enclosure referred to by judge in his charge. 148/721, 723 (10) (98 S. E. 543).

Evidence: Where, in suit to enjoin cutting of timber on realty, both parties relied upon prescriptive title, plaintiff contending that land in dispute was part of her land, and defendants contending that land was part of their tract and that they and predecessors in title had been in actual possession, it

was competent to show by witness for plaintiff who had testified that during period of defendants' actual possession plaintiff's lessees had cut timber on all of plaintiff's tract that such lessees did not cut timber on land in dispute. 148/721, 722 (3) (98 S. E. 543).

Possession: Where two persons claim actual possession he is deemed in possession who has legal title. 142/448, 449 (6) (83 S. E. 200).

Time: Entry and adverse possession in 1909 of vendee from purchaser at sheriff's sale, and cutting by him of most of timber under color of title within seven years of date of bringing of action, would not ripen into prescriptive title in 1914, when suit was brought. 147/55 (1-b) (92 S. E. 892).

§ 4166. (§ 3586.) **Constructive possession.**

Adjacent owners: Where adjacent owners are in constructive possession, no prescription can arise in favor of either. 142/448, 449 (6) (83 S. E. 200).

Deed: Actual possession of part of land described in plaintiff's deed here extended by construction to confines of the tract. 144/445 (3) (87 S. E. 413).

Distinct tracts: Where partitioners assigned to distribute several distinct lots of land, two of which were contiguous, but not described as single body, possession of one contiguous lot could not be executed by construction

over other, so as to make such possession adverse to true owner. 143/756 (85 S. E. 917).

Lots: Where description in deed does not cover single tract, court will not select lots from different divisions of description and treat them as constituting tract comprising contiguous land lots, so as to apply to them the rule of constructive possession, while treating other lots as forming no part of contiguous tract. 142/725 (1) (83 S. E. 683).

§ 4167. (§ 3587.) **Possession extends to what bounds.**

Record: This section has no application to record of partition proceeding, and especially where that proceeding is im-

properly recorded for lack of judgment of confirmation of return of commissioners. 143/756, 762 (85 S. E. 917).

§ 4168. (§ 3588.) **Possession for twenty years gives title.**

Cited. 143/557, 559 (85 S. E. 754).

Stated. 142/448, 453 (83 S. E. 200).

Charge of this section in processioning proceeding though inapplicable, was not injurious to losing party, as issue formed by a protest is not of title but of boundary. 140/245 (3) (78 S. E. 905).

Where evidence of adverse holding was that it existed more than 20 years, improper use of word "more" in charges on the prescriptive period was harmless. 144/311 (2) (87 S. E. 20).

Where party relies upon prescription based upon sections 4168 and 4169,

court should not, in charge, so confuse the two sections as to state in effect that, in order to acquire prescription under color of title, possession relied on as basis of such prescription must be actual possession of the whole tract. 148/721, 723 (12) (98 S. E. 543).

Color of title: Mere form of deed unexecuted does not constitute color of title. 143/7, 8 (8) (84 S. E. 58).

Actual adverse possession of lands under color of title for twenty years will give title by prescription against everyone, except the State and persons

Of title by prescription.

laboring under disability. 147/5, 6 (4) (92 S. E. 514).

Evidence here authorized finding setting up prescriptive title in favor of plaintiff. 147/204 (3) (93 S. E. 205).

There was no evidence here to authorize charge of prescriptive title acquired by twenty years adverse possession. 148/206 (96 S. E. 130).

Presumption: Doctrine of title by prescription is founded on presumption of

right by grant of license to the easement, after twenty years of uninterrupted adverse enjoyment. To authorize presumption from possession alone, enjoyment must not only be uninterrupted for the space of twenty years, but it must be exclusive and adverse, under claim and assertion of right, and not by consent or favor of another claimant or owner. 140/353, 359 (78 S. E. 906).

§ 4169. (§ 3589.) **Possession for seven years gives title, when.**

Applied. 147/654, 656 (95 S. E. 211). Stated. 142/448, 453 (83 S. E. 200).

Administrator: Administrator's deed without order of sale is admissible as color of title. 142/448, 449 (3) (83 S. E. 200).

In suit wherein, after suggestion of defendant's death and amendment, his administrator was made party defendant and a party individually, his individual plea setting up title to part of land in himself under deed executed by intestate three years before institution of suit, and possession thereunder for more than seven years before he was made party defendant, showed prescription in his favor as to part claimed by him individually until he was made party defendant. 148/840 (1) (98 S. E. 471).

Administrator's deed duly executed and recorded, reciting order to sell, sale, and valuable consideration, and conveying certain lot, except widow's dower, and certain other land, was notice to subsequent purchasers that vendee and those who held under him took only the last mentioned land; and one who acquired possession of entire lot under pretended claim, including remainder in dower, would acquire no title to such remainder as against heirs at law, who sue in ejectment for such remainder within seven years from date of death of tenant in dower. 147/315, 316 (2-b) (93 S. E. 895).

Bond for title: Seven years bona fide adverse possession under bond for title with some purchase money unpaid gives good prescriptive title against everybody but obligor and his privies, though maker of bond has no title. 144/497 (2) (87 S. E. 665).

Where purchaser of bond for title had no notice of equities of former

owner, bond would furnish color of title. 145/397 (89 S. E. 334).

Bond for title is color of title, and possession thereunder, with part payment of purchase money, is adverse against all except maker of bond. 268 Fed. 784 (3).

Charge: Evidence for plaintiff showing title in intestate, as alleged in petition, and defendant relying on her assertion that she had acquired title by prescription, not error to so charge jury as to place on defendant burden of establishing by preponderance of evidence the prescriptive title asserted. 140/240 (3) (78 S. E. 909).

Where evidence showed that defendant setting up prescriptive title did not have possession under color of title charge on subject of possession under color of title was not injurious to him, even though the same was not strictly accurate. *Id.* 240 (5).

Charge submitting question whether defendant had been in possession for seven years was erroneous, as excluding from consideration evidence of possession by defendant's predecessors. 143/563 (2) (85 S. E. 856).

Error in charge excluding defendant's claim under possession by his predecessor not cured by charge that his possession could be tacked onto those under whom he claimed. *Id.*

Where two defendants in action for land claimed by prescription by possession under same deed, and court charged that actual fraud would defeat prescription, verdict for one-half the land, implying finding that there was no fraud, made error harmless as against plaintiff. 145/320 (3) (89 S. E. 206).

Charge that seven years' adverse possession under tax deed, though void,

Of title by prescription.

would ripen into title, was not erroneous, as incorrect statement of law applicable to facts of case. 145/438, 439 (4) (89 S. E. 427).

Where, in ejectment suit, court charged that issue was whether defendant had shown prescriptive title for seven years or more, further instructions as to defendant's burden of proof and as to character of possession required, if desired, should have been requested in writing. 146/600 (1) (91 S. E. 682).

Charge that actual possession of property for period of seven years under color of title gives party a good title, did not sufficiently state essential provisions of this section, and constituted reversible error. 147/498, 499 (5) (94 S. E. 759).

Charge here was erroneous as unduly restricting period within which defendants were authorized to prescribe. 148/721, 723 (11) (98 S. E. 243).

Where party relies upon prescription based upon sections 4168 and 4169, court should not, in charge, so confuse the two sections as to state in effect that, in order to acquire prescription under color of title, possession relied on as basis of such prescription must be actual possession of the whole tract. 148/721, 723 (12) (98 S. E. 543).

Color of title: Verdict and decree which, properly construed, did not purport to find title in a party or to vest such party with the title, did not amount to color of title. 140/240 (4) (78 S. E. 909).

Sheriff's deed executed to purchaser at tax sale is good as color of title, though not accompanied by tax fi. fa. under which land was sold. 140/610 (2) (79 S. E. 466).

Where a recorded instrument stated that the signer had sold certain land for which he had not been paid, that he gave notice of a "bonder's lien," that on payment of a certain sum by a certain person he relinquished all his equitable interest in said land and bound himself not to interfere with the last-named person's title, was not admissible as color of title. 141/27 (2) (80 S. E. 461).

A lien is not a title, and a transfer thereof does not purport to convey the title to the land or amount to color of title. Id. 27, 28 (2-a).

Lease of all land "connected with and appertaining to" or "owned by" the lessor, under which defendant claimed, held admissible, where it was shown that the land in controversy was thus connected or owned by the lessor. Id. 27, 28 (4).

A writing which upon its face professes to pass title to realty but does not do so is sufficient to constitute color of title. Id. 27, 29 (6).

Conveyance by one having mere color of title, but who never takes possession, creates no color of title in the grantee, additional to that arising from a conveyance to him. Id. 27, 29 (7).

One can not, by making a grant, create color of title in favor of himself, though he may do so in favor of his grantee. Id. 27, 29 (7-b).

Color of title to one person who never takes possession but subsequently conveys to another, without referring to the former conveyance, is not color of title to such person; the conveyance from his grantor being his color of title in an action to recover land. 141/65 (1-b) (80 S. E. 462).

Return of partitioners, adopted by distributees, constituted color of title, on which distributee could base prescriptive title. 143/756 (5) (85 S. E. 917).

Where intestate land vested in his widow and children as tenants in common, and widow sells land after children become of age, and purchaser enters into possession under written evidence of title and holds for more than seven years, he acquires prescriptive title against children and their father's administrator appointed 43 years after his death. 144/497, 498 (5) (87 S. E. 665).

Deed made by heirs of decedent conveying decedent's land to trustee for purpose of giving effect to unexecuted will, by which decedent intended to make another beneficiary of his bounty was not color of title on which to base adverse possession as against heir who did not join in such deed. 145/771 (89 S. E. 830).

Of title by prescription.

Deed purporting to have been executed by attorneys in fact is admissible as color of title, although power of attorney be not produced. 146/721 (3) (92 S. E. 67).

Description: Deed is not admissible as evidence of color of title unless description is sufficiently certain to satisfy requirements of conveyance. 143/727 (3) (85 S. E. 874).

Deed purporting to convey tract of land in stated land district of named county, as being "that portion of lot No. 112 lying in the southwest corner, all that portion of the south side of a certain little branch running across the corner of said lot, containing 40 acres, more or less," is not defective as conveyance of title or as color of title, if it be shown by extrinsic proof that at date of conveyance a stream did traverse the southwestern corner of the lot. 147/17 (2) (92 S. E. 538).

In absence of such proof deed was ineffective as conveyance of title or as color of title. *Id.* 17 (3).

Instrument in form of bond for title, containing following description only: "forty acres of land commencing at the northeastern corner and running to Bear Creek west then Bear Creek being the line to the original west line being lot No. (389) three hundred and eighty-nine in the 9th district of said county," is inadmissible as color of title, because description is too vague and indefinite and insufficient to identify any particular tract of land, the entire lot in this instance containing 490 acres. 149/610 (1) (101 S. E. 535).

If instrument relied on as color of title of color be fatally defective in description of premises, actual occupancy of a part can not be adverse to extent of any boundaries whatever. 149/610 (2) (161 S. E. 535).

Direction of verdict: Where, in action for land, evidence for plaintiff required verdict in her favor, and it was essential in defense of action to show seven years adverse possession of land under color of title, and defendant in her testimony admitted that she had not been in adverse possession of land seven years before institution of suit, there was no error in directing verdict for plaintiff. 147/443 (1) (94 S. E. 543).

Dower lands: Possession under dower right can not be basis of prescription against heirs during life of widow. 145/241, 242 (2) (88 S. E. 976).

Evidence in an action to recover land, wherein defendant relied upon title by adverse possession under color of title, through a recorded deed, held to sustain verdict for defendant. 141/27, 29 (8) (80 S. E. 461).

Evidence here established prescriptive title based on more than seven years' adverse possession under deed. 146/721 (1) (92 S. E. 67).

Evidence here authorized finding setting up prescriptive title in favor of plaintiff. 147/204 (3) (93 S. E. 205).

Where court, in complaint for land, confined issue before jury to one question which was controlling under the facts, namely, proof of bona fide, continuous possession by plaintiffs under their vendor's deed for seven years, etc., admission of documentary evidence of doubtful relevancy, such as annual return of administrator of intestate under whom defendant claimed as heir at law, certain deed from predecessors in title, etc., was harmless error. 148/90 (1) (95 S. E. 994).

Forgery: Excerpt from instruction here construed with entire instruction stated that if prescriptive title was not established, perfect paper title deraigned from State would prevail. 144/445 (2) (87 S. E. 413).

Charge that if deed on which defendant relied was forgery, and grantee knew or had reasonable grounds to suspect forgery, it would not avail to support her claim of prescriptive title, was inaccurate. *Id.* 445 (3).

Good faith: Question of prescriber's good faith is ordinarily one of fact. 144/497 (4) (87 S. E. 665).

Charge that one may be informed that he is not getting title, and yet believe in good faith that he is getting good title, was not erroneous. *Id.*

Knowledge by purchaser that vendor does not claim ownership, but is in possession as agent of another, goes to faith of purchaser who attempts to prescribe under vendor's deed, rather than to raise technical estoppel against denying title of his vendor's principal. 145/320 (2) (89 S. E. 206).

Of title by prescription.

Homestead: Fact that purchaser under deed of homestead had acquired title by prescription as against widow of homesteader, would not cause title by prescription to run against minor son of homesteader, it not appearing that prescription ripened prior to death of husband. 147/450 (94 S. E. 578).

Judgment: Purchaser at sale under execution based upon void judgment holding sheriff's deed has color of title, and if in good faith he enters into possession and holds land adversely for seven years, he has good title by prescription. 146/373 (2) (91 S. E. 414).

Partition: Where deed vested title in woman and her children then in being, and thereafter she conveyed land in fee simple to third person, petition in partition by her children was demurrable, where its allegation showed that woman's grantee had held adversely to children for more than seven years. 141/793 (2) (82 S. E. 232).

Possession: In order that prescription may ripen into title there must not only be color of title but possession under it. 141/27, 29 (7) (80 S. E. 461).

Sheriff's deed offered as evidence of title was properly excluded, where it did not purport to convey title to any one who took possession thereunder. 141/65 (1-b) (80 S. E. 462).

Instruction that where one holds part of land under color of title he is presumptively in possession to boundaries described, was harmful error where boundaries were not described with degree of certainty required by law. 149/610, 611 (3) (101 S. E. 535).

Quitclaim deed to land, containing recitals of fact concerning conditions under which it was executed, properly attested for record, and duly recorded, is admissible in evidence as registered deed; but recitals of fact therein contained are not evidence of truth of such recitals as against one not party to the deed, or his privy. 146/721 (4) (92 S. E. 67).

Remaindermen: Where testator bequeathed land in trust for his daughter "when she shall arrive at the age of 16 years, . . . to be kept for her sole and separate use and such child or children as she may have living at

her death," prescription did not begin to run in favor of daughter's grantee and against her children until her death, whether the trustees represented only her or her children also. 142/1 (82 S. E. 292).

Where trustee was trustee for remaindermen as well as for life tenant, plea of adverse possession available against trustee was available against the remaindermen. 142/163, 164 (2) (82 S. E. 544).

Where executor, trustee for life tenant and for remaindermen, conveyed property to defendant who held adversely for the necessary period, prescription was complete defense against action by remaindermen. *Id.* 163, 164 (3).

Possession of trustee of trust created for life estate only could not ripen into prescriptive title as against remaindermen until after lapse of statutory period after life tenant's death. 142/317 (1) (82 S. E. 890).

Prescription did not begin to run against remainderman until death of life tenant. 148/322, 325 (7) (96 S. E. 628).

Where interest of a life tenant in land was sold by trustee who represented both the life and remainder interests, prescription began to run in favor of the buyer and his successors in title from the date of the purchase. 148/376, 377 (4) (96 S. E. 863).

Security deed: Where a person, after taking security deed, is admitted into possession under an agreement whereby he purchases the grantor's equity, his possession becomes adverse, and after seven years he acquires prescriptive title as against the grantor. 141/435 (3) (81 S. E. 203).

Where one without title conveyed land for life with vested remainder to life tenant's children, and life tenant conveyed such land as security for debt, and land was sold in execution as property of such life tenant, prescriptive period in favor of purchaser, relatively to children of life tenant, would not be tolled by time life tenant may have lived subsequently to date of entry of the pre-

Of title by prescription.

scriber (purchaser at sheriff's sale). 146/420 (3) (91 S. E. 479).

Sheriff's deed not accompanied by execution under which property is sold is admissible as color of title. 142/448, 449 (3) (83 S. E. 200).

Where loan company obtained possession under void sheriff's deed, purchaser from it, taking with notice, took subject to equity of original owner, so that prescription would not run in his favor. 145/397 (89 S. E. 334).

Where one without title executes deed purporting to convey land to another for life, with vested remainder to children of life tenant, and life tenant takes possession and executes deed purporting to convey land in fee to third person as security for debt, and debt is reduced to judgment and land is sold as property of life tenant, and deed is executed by sheriff, purporting to convey land in fee, and purchaser enters into adverse possession under sheriff's deed in good faith, and remains in possession for seven years, he will acquire prescriptive title. 146/420 (2) (91 S. E. 479).

§ 4170. (§ 3590.) Prescriptive right to easement.

Permissive use: Although for more than twenty years crossing over railroad tracks is used by persons and vehicles, public will not acquire easement by prescription unless use has been adverse, exclusive, and under claim of

Tax fl. fa. Where defendant sought to set up prescription and adverse possession under written evidence of title, not error to admit in evidence, as color of title, tax deed conveying premises to one under whom defendant claimed, together with tax fl. fa., attached to deed and made part thereof. 145/438 (1) (89 S. E. 427).

Time: Evidence of defendant's possession of premises in dispute, for less than seven years, under color of title, would not authorize direction of verdict in his favor. 147/315 (2-a) (93 S. E. 895).

Wild land: Erection and occasional use of pen for cattle or hogs, ten feet square, on a lot of wild land containing 490 acres, and using land at intervals as range for cattle, and cutting of small quantity of timber therefrom, by one who claims under color of title, is not such possession as affords basis for title by prescription. 147/55 (1-a) (92 S. E. 892).

Written evidence: Adverse possession of lands, under written evidence of title, for seven years will give title by prescription. 147/55 (1) (92 S. E. 892).

right, and not by permission of owner. 148/635 (1) (98 S. E. 83).

Water: One who maintains dam and for 20 years causes water to overflow lands of another may obtain prescriptive easement of flowage. 144/32 (1) (85 S. E. 1005).

§ 4171. (§ 3591.) Dedication to public use.

Acceptance of dedication of land as public street may be shown by an act of municipality recognizing existence of street. 142/321 (1) (82 S. E. 884).

Acceptance may be implied from improvements or repairs done on portion of street by municipality. Id. 321 (2).

In order to constitute dedication of land to public uses, offer express or implied, on part of owner, to dedicate use of land to public must be shown, and there must be an acceptance, express or implied, of use of the

land by public authorities. 148/85 (1) (95 S. E. 962).

In order to be dedication to public of use of land for street there must be an acceptance. 148/635 (2) (98 S. E. 83).

Before a road shall become public highway, there must be some act on part of county authorities which will amount to acceptance of it as such on their part; such acceptance need not necessarily be directly made but itself may be implied. 23 App. 45 (2) (97 S. E. 459).

Of title by prescription.

Work and maintenance of a road dedicated as public highway by legally constituted authorities is most usual method of manifesting acceptance; but exercise of other dominion over it, or assertion of claim thereto by such authorities may amount to such recognition of dedication as to indicate acceptance. 23 App. 45 (2) (97 S. E. 459).

Plaintiff's petition based upon obstruction of section of public road, forming part of highways of county, "accepted by the public and used by the public as a public thoroughfare and highway" for thirteen months, held to fail to show acceptance as a public highway, but negatived such an acceptance. 23 App. 45 (3) (97 S. E. 459).

Bond for title: Land can be dedicated for public use only by the owner, and not by holder of bond for title to land incumbered with security deed. 143/457 (1) (85 S. E. 332).

Effect: One dedicating land to public use can not appropriate such land for private use after public has entered into possession and used the land, so that interruption of such use would materially affect public or private rights. 144/688 (1) (87 S. E. 917).

Effect of dedication of land to public uses is to deprive owner of his title; he retains exclusive right in the land for every purpose of user or profit not inconsistent with the public easement, but he is estopped, while the dedication continues, from asserting any right in the soil inconsistent with the public easement. 148/85 (1) (95 S. E. 962).

Fee: Where there has been a dedication of land to public uses only, ultimate fee remains unaffected thereby. 148/85 (1) (95 S. E. 962).

Implied dedication: Acts of owner relied upon must be such as clearly indicate an intent to exclusively devote the property to public use. 140/353 (1) (78 S. E. 906).

Where dedication is implied, it must appear that property has been in exclusive control of public long enough to raise presumption of gift; such presumption arises where there is proof

of such use for seven years, accompanied by evidence of such acquiescence on part of owner as would manifest intention to make gift. 23 App. 45 (1) (97 S. E. 459).

Injunction: Where dedication of land over which proposed street was laid out was complete and there was part performance by city authorities, executrix of deceased owner, who died before completion of work, not entitled to injunction against opening. 142/723 (83 S. E. 665).

Intention: Dedication to public of use of land for street rests upon intent of owner to make such dedication. 140/353 (1) (78 S. E. 906).

Dedication to public of use of land for street rests upon intent of owner to make such dedication; where dedication is not expressed, acts of owner relied upon to imply dedication must be such as to clearly indicate intent to exclusively devote property to use as street. 148/635 (2) (98 S. E. 83).

License: In absence of proof of express dedication and acceptance, use of wharf property by some of the public who do not come thereon to transact business, will be regarded as in the nature of a license, and of itself will be insufficient to raise implication of its dedication as a street. 140/353 (2) (78 S. E. 906).

Public road: Dedication accompanied by general and continued adverse use by traveling public will never become sufficient to impress upon road character of being public one, and thus impose upon county authorities duties and responsibilities incident thereto. 23 App. 45 (2) (97 S. E. 459).

Purpose: Where dedication, express or implied, is made for specific purpose, public authorities have no power to use property for any purpose other than one designated. 148/85 (2) (95 S. E. 962).

Property dedicated to particular purpose can not by the dedicatee, a municipality, be diverted from that purpose except under right of eminent domain. 148/85 (2) (95 S. E. 962).

Properly dedicated to public use may by the dedicatee be put to all customary uses within the definition of the use. 148/85 (3) (95 S. E. 962).

Of title by prescription.

Any use which is inconsistent, or which substantially or materially interferes, with use of property for particular purpose to which it was dedicated, will constitute a misuser or diversion; while under general rule misuser or diversion for any purpose other than one designated will not work reversion of property freed from easement to owner of dominant fee, equity will, on petition of proper parties, enjoin such misuser or diversion. 148/85 (3) (95 S. E. 962).

Sidewalk: Where private property abutting on public highway or street was dedicated to use of public as sidewalk as that term is generally and commonly understood, municipal authorities can not convert sidewalk into street for vehicular traffic, as by so widening street as to include sidewalk within street proper, without first acquiring right to do so from owner of dominant fee, either by purchase or under right of eminent domain. 148/85 (4) (95 S. E. 962).

Streets: Where wharf-owner retains dominion over and use of dock-yard, although permitting public to travel over it as if it were part of street adjacent thereto, for upwards of twenty years, such use is so lacking in elements of adversity and exclusiveness as to be insufficient to establish prescriptive right. 140/353 (3) (78 S. E. 906).

Fact that town had not been incorporated at time of dedication would not destroy effectiveness

thereof, the organization and incorporation of the town being shortly thereafter accomplished and the municipality having accepted and enjoyed the street for a long period of time. 142/321 (3) (82 S. E. 884).

Working of street is acceptance as of date when work began, though there was no prior acceptance. 15 App. 654, 655 (8) (84 S. E. 139).

Municipal corporation may, by abandonment, relinquish its control over street which has been dedicated to it for public use. 148/317 (2) (96 S. E. 625).

Where dedication is expressed and street is used for such length of time that public accommodation or private rights would be materially affected by an interruption of enjoyment, dedication becomes effectual, even though period of seven years has not elapsed. 23 App. 45 (1) (97 S. E. 459).

Wharf property on a navigable stream is a place of a quasi-public character, to which the public are invited, and fact that without intent to make dedication a wharf-owner permits its use by some of the public who do not come thereon to transact business, should not operate to defeat his title. 140/353 (2) (78 S. E. 906).

Withdrawal: Landowner offering to dedicate land for highway on certain conditions, which were not met by other landowners, may withdraw his offer, though county has accepted it. 143/457 (2) (85 S. E. 332).

§ 4172. (§ 3592.) Prescription for personalty.

Knowledge: Where A lent certain finger-rings to B, and B, unknown to A, gave them to C as a present, fact that C retained continuous open possession of them (claiming them as her property), in this State, for more than four years, did not give her good title by prescription, where it appears that B had never, to the knowledge of A,

claimed title to the property nor refused to return the rings to A, and where it further appears that A had no knowledge that they were in possession of C; under such circumstances C did not have adverse possession within meaning of this section. 22 App. 723 (1) (97 S. E. 101).

§ 4173. (§ 3593.) Disabilities.

Minor: Petition here to have title to land occupied by petitioners' guardian declared to be in petitioners and setting up ignorance of certain deed,

not barred. 148/169 (1) (78 S. E. 723).

In ejectment brought by child of daughter of grantor who had been

Of title by prescription.

given trust estate for life against subsequent purchasers from trustee, who had been in adverse possession of land for more than twenty years it was not erroneous for court to adjudge that plaintiff was not entitled to recover. 146/536, 537 (2) (91 S. E. 556).

Where remaindermen under trust deed, except plaintiffs in error, attained their majority more than seven years prior to filing of suit against

purchaser at alleged unauthorized sale by trustee, only plaintiffs in error brought action in time. 147/5, 6 (5) (92 S. E. 514).

Fact that purchaser under deed of homestead had acquired title by prescription as against widow of homesteader, would not cause title by prescription to run against minor son of homesteader, it not appearing that prescription ripened prior to death of husband. 147/450 (94 S. E. 578).

§ 4175. (§ 3595.) **Other exceptions.**

Cited and applied. 145/875, 880 (90 S. E. 67).

Trustee: Where one named in will as trustee for life tenant and remaindermen fails to accept trust and to qualify, there is vacancy in trusteeship, and during such vacancy prescription does not run in favor of one in possession of trust property, as against remaindermen, until death of life tenant. 146/608 (2) (91 S. E. 548).

Unrepresented estate: Provision as to prescription against estate of decedent on which no representation is

had within five years does not apply to trust estates. 146/608 (2) (91 S. E. 548).

Where more than five years elapse after death of intestate before administration upon his estate, prescription will not be suspended for any length of time on account of estate being unrepresented; charge that date upon which plaintiff's intestate died was of no importance, when considered in connection with pleadings and evidence, was not erroneous. 147/498 (4) (94 S. E. 759).

§ 4177. (§ 3597.) **Fraud to prevent prescription.**

Actual fraud: Charge tending to carry suggestion that legal fraud, in contradistinction to moral fraud, would be sufficient to prevent adverse possession from ripening into title, was erroneous. 145/256 (3) (88 S. E. 980).

Bond for title: Where purchaser of bond for title deceived original vendor and prevented bringing of suit, time during which she was thus delayed would not be accounted in favor of

purchaser in determining prescriptive right. 145/397 (89 S. E. 334).

Tenant: Where one enters into possession of land as owner, but, by falsely stating to equitable owner that his possession is merely that of a tenant, induces her to delay, he is estopped to assert that the period during which she delays should be counted in computing any prescriptive period in his favor as against her. 142/237, 240 (2-c) (82 S. E. 649).

§ 4178. (§ 3598.) **Transfer of prescriptive title.**

Stated 141/27, 29 (7) (80 S. E. 461).

Of conveyance of titles; generally.

CHAPTER 7.

Of Conveyances of Titles.

ARTICLE 1.

Generally.

§ 4179. (§ 3599.) Requisites of a deed.

Cited. 144/372, 374 (87 S. E. 301).

Cancellation: Absolute deed will not, at instance of grantor, be cancelled merely because of breach by grantee of promise made by him in consideration of which deed was executed. 145/284 (1) (88 S. E. 986).

Consideration:

Inquiry: Where A conveys land to B by deed reciting money consideration, in suit brought by A's trustee in bankruptcy against B's executors, alleging that consideration was as expressed in deed, and that only part thereof had been paid, and seeking to subject land to alleged balance due, it may be explained, as valid defense to suit, that consideration named was not the actual consideration, and that consideration agreed upon had been paid. 148/21 (1, 2) (95 S. E. 963).

Delivery:

Control: Where signed warranty deed containing attestation clause in usual form is found, after death of grantee, in private safety deposit box in bank, in which box grantee's papers have been kept, delivery of deed by grantor will be presumed. 146/307 (2) (91 S. E. 204).

Record: Charge, in action by grantor against heirs of grantee to have deed cancelled because never delivered, that if grantor executed the deed, signed it in presence of witnesses, and had it recorded in county where land lay, this would be prima facie evidence that it was delivered, and would authorize belief that it was delivered, unless there was some evidence showing that it was not, and that grantor did not intend to make and deliver the deed by what he had done, was

Delivery—continued.

not cause for new trial. 148/812 (3) (98 S. E. 549).

The record of a deed properly executed is prima facie evidence of its delivery, and it becomes conclusive evidence if it is not rebutted by proof. 20 App. 175 (1) (92 S. E. 957).

Presumption of delivery arises where properly executed deed, purporting on its face to have been delivered, was recorded. 23 App. 432 (2-a) (98 S. E. 363).

Third person: There was actual delivery where grantor handed deed to clerk of superior court to be recorded, and successor of clerk caused it to be handed to grantee by third person. 144/192 (1) (86 S. E. 547).

Time: For deed to be effective as conveyance to title to land, its delivery, actual or constructive, during life of the grantor, is essential. 149/509 (101 S. E. 121).

Executed: Where deed insufficiently executed outside the State is properly re-executed within the State and recorded it is competent evidence of title. 142/850 (3) (83 S. E. 955).

Name: Where administrator, pursuant to order authorizing private sale of land, leaves blanks in deed for names of grantees, and instrument is afterwards filled out by attorney of heirs of estate without knowledge of purchaser, deed will pass title. 144/1 (3) (85 S. E. 1007).

Seal: Absence of seal from deed conveying land will not alone render deed void. 147/371 (1) (94 S. E. 251).

Where deed conveying land is executed under deed by person other than grantor, in pursuance of power of attorney signed by grantor, but

Of conveyance of titles; generally.

paper relied on as power of attorney was not executed under seal, deed so executed is not binding upon purported grantor. 147/371 (1) (94 S. E. 251).

Surrender: Where husband who bought land caused deed to his wife to be

executed by vendor, mere fact of surrender of deed by wife to husband, and its destruction, will not operate to divest title of wife. 147/37 (2) (92 S. E. 863).

§ 4180. (§ 3600.) Grantee bound by conditions in deed.

Stated. 145/594 (1) (89 S. E. 693).

Estate: One going into possession of land under belief of all parties that description in deed referred to land she was accepting, she treating it so by selling and conveying it to another, can not thereafter claim any greater estate than that provided for her in the deed. 149/151, 156 (99 S. E. 376).

Restrictions: Where owner of land sold portion of it, deed reserving right to use thirty feet on one side for purpose of hauling logs and loading logs and lumber so long as he owned remainder of land and operated sawmill on it, and stipulating "that this right of use shall not interfere with business of grantee or his heirs or assigns in or to property conveyed," such restriction against interference with

business was but limitation on reasonable use by grantor in enjoyment of easement, and did not permit destruction of easement by building of warehouse, although such house might be useful in conduct of business. 146/694 (2) (92 S. E. 220).

Wife: Under provisions of antenuptial settlement here, together with fact that husband purchased interest in land with wife's funds, that deed was made to him, and that he conveyed the land to himself as trustee for his wife for life, and at her death the land to go to and vest in such child or children as were born or might be born, wife's possession will be deemed to have been in consonance with the deed, rather than in opposition to it. 147/138 (1) (93 S. E. 93).

§ 4182. (§ 3602.) Form of deed.

Description:

Adjacent lands: Deed describing land as "lot No. 1," extending back 300 feet, conveyed only the lot named where such lot did not extend back such distance, though grantor owned the land adjacent to the rear of the lot. 142/390 (1, 2) (82 S. E. 1058).

Deed describing property as certain tract of land lying in certain district G. M. of certain county, containing stated number of acres, "bounded on the east by the Oliver Mill branch; south by lands of E.; west by the Bare Bay; north by lands of the said" grantor, was not void on its face for uncertainty or insufficiency of description. 149/377 (1) (100 S. E. 373).

Blank: Deed executed in blank is void. 146/794 (1) (92 S. E. 534).

Where grantor signed, sealed, and delivered paper in form of deed, with understanding that agent of grantee, to whom actual delivery was made, might thereafter insert

Description—continued.

therein description of property intended to be conveyed, and where such agent, after delivery, did insert description of property, deed was nevertheless void. 146/794 (1) (92 S. E. 534).

Deed which is void because executed in blank may be ratified, and instruments acknowledging or ratifying deed previously made are not required to be of same formality as deed itself, or to have more than one witness. 146/794 (2) (92 S. E. 534).

Where grantor delivered deed executed in blank and directed grantee's agent to insert description, and thereafter acknowledged deed and corrected description, equity in grantor's suit two years after sale will not cancel deed because description omitted an exception of certain timber. 146/794 (3) (92 S. E. 534.)

Color of title: Where description of property is so vague and indefinite

Of conveyance of titles; generally.

Description—continued.

as to afford no means of identifying land, deed is inoperative either as conveyance of title or as color of title. 144/375 (1) (87 S. E. 273).

Consideration: Requisites as to matters of description in deed are same whether based upon valuable or good consideration. 148/839, 840 (1-b) (98 S. E. 490).

Contents: Deed here construed and held to be conveyance by tract and not by acre. 143/726 (1) 85 S. E. 851).

Definiteness: Deed here not void as matter of law for indefiniteness of description. 142/862 (1) (83 S. E. 939).

Identification: Descriptive averments of deed here executed by administratrix were sufficient to identify land intended to be conveyed. 143/98, 99 (4) (84 S. E. 426).

Description here in deed was not so indefinite as to exclude deed from evidence. 143/526 (1) (85 S. E. 691).

Exception in deed of "forty acres, more or less, on the northeast side of a certain branch known as Boggy Branch," is not void for uncertainty, but includes all land northeast of such branch. 145/450 (89 S. E. 422).

Deed describing land by setting forth that it is bounded on the four sides by lands of certain named owners and by certain described watercourses, and stating number of acres contained, is neither vague nor uncertain in its description. 145/562 (4) (89 S. E. 704).

Deed to land will not be declared void for uncertainty of description, if description is certain, or if it furnish key to identification of land intended to be conveyed. 147/467 (2) (94 S. E. 571); 148/137, 138 (2) (96 S. E. 4).

Deed here was properly admitted in evidence over objection that description of land was so indefinite and uncertain that land could not be identified therefrom. 147/467 (3) (94 S. E. 571).

Deed headed "State of Georgia, Washington County," giving "the land and plantation whereon my

Description—continued.

father and mother now live, being two hundred acres, more or less," was not void for uncertainty of description. 148/137, 138 (2) (96 S. E. 4).

Deed here construed and held to convey tract of land in dispute to plaintiff in ejectment, and court did not err in directing verdict for him, issue of mesne profits having been waived. 148/294 (96 S. E. 497).

A deed to land is not void for uncertainty of description, if it furnishes the key to the identification of the land intended to be conveyed by the grantor. 148/839 (1) (98 S. E. 490).

Deed or timber lease of all timber of every description, except oak and hickory on swamp and creek lands of Spring Creek, where it runs through 169 acres off south side of lots 149 and 171, in thirteenth district of Miller County, except that on 31 acres of land in southeastern corner of lots 149, and except part of lot 171 included under a fence, was too indefinite and uncertain to identify exact timber intended to be conveyed, and did not pass title to any of the timber. 24 App. 259 (100 S. E. 651).

Interest: Paper writing here was sufficiently definite as to description of property, and its terms were broad enough to comprehend all interest the maker had in the estate of his deceased father. 146/204, 205 (1) (91 S. E. 22).

Levy: Sheriff's deed describing land in same manner as in entry of levy was not so indefinite here as to be void and incapable of being applied to the subject-matter by extrinsic evidence. 143/703, 704 (4) (85 S. E. 830).

Map: It was not erroneous, in proceeding to establish title under deed alleged to have been executed by deceased, where widow set up title under allotment as year's support, to admit in evidence certified copies of record from court of ordinary describing land as specified number of acres of given lots; official map showing lots consisted of that num-

Of conveyance of titles; generally.

Description—continued.

ber of acres. 146/513 (1) (91 S. E. 771).

Name: Description in conveyance to convey, "certain tract of land located in T. county, State of Georgia, in the 4th district, and being one hundred and thirteen and one-half acres from the east side of land lot 54, all of land lot 49, six acres in the immediate northeast corner of land lot 21, 112 acres from land lots 20 and 21; said tracts comprising approximately four hundred acres, and being the same property as described in deed recorded among T. county record in Book 10, p. 656, and known as the Roberts place," is not so indefinite as to render it void and subject to general demurrer. 147/30 (4) (92 S. E. 636).

Number: Deed of tract in certain district, described as "lot 216, containing 460 acres, more or less," is sufficient to convey whole lot though court will take judicial cognizance of fact that lots in the county contained 490 acres of land. 145/592, 593 (3) (89 S. E. 687).

Description of property in deed as "land lying and being in H's Addition in T., Ga., being lots two and four in said section," was insufficient. 148/650 (1) (97 S. E. 852).

Administrator's deed describing property as south half of certain numbered lot in certain district of named county, containing stated number of acres, more or less, and also another stated number of acres, more or less, in the southwest corner of certain numbered lot of land, in certain district of named county, construed in connection with order of sale, sufficiently described land to be conveyed. 148/700 (1-b) (98 S. E. 345).

Where testator devised life estate to niece and to her children or their representatives and died seized of city lot in certain city, in named county, and certain numbered lots in certain district of same county, and daughter of niece conveyed her interest under the will to land in such county and the numbered lots, the deed vested her interest in the

Description—continued.

said city lot. 148/839 (1-a) (98 S. E. 490).

Parol: Extrinsic evidence was admissible in ejectment to identify land described in deed as that purchased by grantor. 143/526 (1) (85 S. E. 691).

Where descriptive terms of deed are clear and unambiguous, courts will construe the terms, and parol evidence is not admissible to control legal effect of such description; where description is uncertain and ambiguous, parol evidence is admissible to correctly apply the descriptive terms. 149/514, 515 (3) 101 S. E. 127).

Part: Where 21.5 acres were set apart as dower, conveyance of 35/79 part of the dower, "the same being 7.8 acres," conveyed title to the 7.8 acres and not merely undivided interest, the word "part" referring to physical portion, not an undivided interest. 144/696 (87 S. E. 1032).

Words "the same" refer to the part conveyed, not to entire dower. *Id.*

Inaccuracy in statement of proportion will not affect title conveyed if description was otherwise sufficient. *Id.*

Though description of tract as containing 7.8 acres might be declared void in controversy between grantor and grantee, it is immaterial in proceeding by grantee of same grantor for partition. *Id.*

Reference: Where, in action for land, plaintiffs declared on deed which did not in terms describe land, but contained internal reference to will, under which grantor in deed was beneficiary, it was error to sustain special demurrer interposed to that paragraph of petition and deed attached thereto as exhibit, on ground that allegation and exhibit were too general, vague, and indefinite. 148/539 (1) (97 S. E. 534).

Where testator devised all of his estate to his wife for life and over to niece for life and over to her children or their representatives, and died seized of a certain city lot in a named city of certain

Of conveyance of titles; generally.

Description—continued.

county, and of certain numbered lots in a stated district of the same county, deed by daughter of niece of her interest under the will in testator's land in the named county, including such lots, held not void for uncertainty of description, when considered with the will and extrinsic evidence. 148/839 (1) (98 S. E. 490).

A deed, for description of land conveyed, may refer to plat or map, and plat or map to which reference is thus made is considered as incorporated in the deed itself. 149/514, 515 (1) (101 S. E. 127).

Repugnant descriptions: In construction of deed real intent is to be gathered from whole description, including general description as well as particular; but, as general rule, where repugnancy exists between a general and a particular description, latter will control. 149/514, 515 (2) (101 S. E. 127).

Shape: Deed to northern half of designated lot of land, rectangular in shape, includes all of the lot north of a line equidistant from north and south lines of lot; such description is definite and without latent ambiguity. 146/369 (1) (91 S. E. 114).

Deed conveying irregular tract of land construed, and held not so indefinite in description that it could be held as matter of law that description given could not be applied to subject matter of conveyance by aid of evidence. 147/122 (2) (92 S. E. 875).

Stream: Deed purporting to convey tract of land in stated land district of named county, as being "that portion of lot No. 112 lying in the southwest corner, all that portion on the south side of a certain little branch running across the corner of said lot, containing 40 acres, more or less," is not defective as conveyance of title or as color of title, if it be shown by extrinsic proof

Description—continued.

that at date of conveyance a stream did traverse the southwestern corner of the lot. 147/17 (2) (92 S. E. 538).

In absence of such proof deed was ineffective as conveyance of title or as color of title. Id. 17 (3).

Street: Description, in agreement to convey "certain real estate of the plaintiff known as No. 48 Angier Avenue" in certain city, named county, Georgia, is not so indefinite as to render it void for uncertainty and subject to general demurrer. 147/30 (3) (92 S. E. 636).

True boundary: Where, in description in deed, land is bounded on one side by right of way of railroad company, true boundary line between land conveyed and right of way must be taken as boundary line, and not the line that was understood to exist at time of execution of deed, if there is variance between such two lines. 146/352 (1) (91 S. E. 117).

Vagueness: Deed to "153 1/3 acres off of lot of land No. 42" too vague and uncertain to convey any portion. 148/168, 169 (4) (78 S. E. 721).

Exception: Where deed excepts certain land as conveyed in specified deed recited to have been formerly executed by grantor to another person, grantee does not thereby acquire land so excepted; and in suit by such grantee against such other person, to cancel former deed, and to have title conveyed thereby decreed to be in plaintiff, where petition with exhibits made part thereof showed upon its face such facts, case was properly dismissed on general demurrer. 148/650 (98 S. E. 77).

Intention: Necessary that language indicating an intention of maker of deed to convey a present estate in specific land to a named grantee be used. 140/736 (79 S. E. 853).

Mortgage is distinguished from deed, in that it does not pass title while deed does. 17 App. 666 (2) (87 S. E. 1100).

§ 4183. (§ 3603.) **Escrows.**

Bond for title: Where one deposits with bank bond for title to land as security for loan, and bank voluntarily enters

into another transaction with maker of bond, surrendering it to him and receiving in lieu of it deed conditioned

Of conveyance of titles; generally.

to be void upon payment of purchase money, and also escrow deed conveying land to obligee in bond, when last purchase money note for land is paid, defeasance deed becomes void, and escrow deed having been filed for record by bank, operates to convey full title for general purposes. 147/265 (1) (93 S. E. 418).

Where bank had parted with its full title to land, it had no title which it could convey for purpose of levy and sale. 147/265 (2) (93 S. E. 418).

Exception: Deed conveying land, excepting timber privileges under lease by former owner, does not convey any rights in the timber to grantee though such lease had expired. 145/590 (89 S. E. 686).

Grantee: Common-law rule that there can be no delivery in escrow of deed to grantee, though still in force, does

not apply to ordinary simple contracts in writing, especially those not reciting delivery. 17 App. 680, 681 (4) (87 S. E. 1099).

Payment: An escrow agreement providing that deed should not be delivered to purchaser until final purchase-money is paid required that deed should be held in escrow until all the purchase-money notes were paid. 142/424 (1) (83 S. E. 93).

Record: Where instrument of writing was executed as deed, was attested by two witnesses one of whom was an officer authorized to witness deeds, purported on its face to have been delivered, and was recorded, presumption of delivery was raised; this presumption is not conclusive, and as between parties to instrument it may be rebutted. 148/128 (2) (96 S. E. 3).

§ 4185. (§ 3605.) **Adverse possession does not void deed.**

Common law: This section is result of legislative enactment (Acts 1859, p. 24), and it abolished the common-law

rule making void all conveyances of land at time in adverse possession of another. 149/276, 277 (99 S. E. 886).

§ 4187. (§ 3607.) **Inconsistent clauses in deed.**

Stated. 140/789 (80 S. E. 12).

Children: There is no conflict between portion of deed reciting that named person and her children are parties of the second part and granting clause providing that the property is sold and conveyed unto said named person during her life, and at her death to her children and her heirs and assigns. 149/151, 156 (99 S. E. 376).

Life estate: In so far as provision of deed conferring power of making

testamentary disposition of property is repugnant to provisions creating absolute estate in a first life tenant, it is void. 148/287, 289 (3) (96 S. E. 564).

Trust: In construction of trust deed, or deed in nature of trust deed, due regard should be had to intention of parties, and construction must be upon the whole deed and not merely upon disjointed parts of it. 148/317 (1) (96 S. E. 625).

§ 4189. (§ 3609.) **Estoppel.**

Administrator: If, while title is vested in wife by virtue of deed which husband who bought land caused to be executed by vendor, husband seeks to sell property to third person, and wife knows of intention to do so, and upon request of contemplating purchaser to know if she is satisfied for sale to be made she in response assents thereto, and sale is actually made in good faith, it being part of trade that purchaser shall take possession of major

portion of land, and wife dies while residing on property, administrator of wife will be estopped from asserting title against such purchaser. 147/37 (3) (93 S. E. 863).

After-acquired title: Title subsequently acquired by maker of warranty deed by payment of purchase money to her grantor passes to her grantee. 140/435 (79 S. E. 196).

Grantor: Where a vendor conveys land with general warranty, though at the

Of conveyance of titles; generally.

time he may not own an undivided interest therein, if he subsequently acquires such interest it will pass at once to the warrantee. 141/126 (2) (80 S. E. 630).

Where three persons execute deed, and subsequently successor in title of grantee brings ejectment against two of grantors, defendants will not be heard to allege or prove that other grantor was not of age when deed was executed, or that they were not sole

owners of land conveyed, as against express recitals to this effect in deed. 147/9 (1) (92 S. E. 650).

Quitclaim deed: Where administrator sues to recover land for distribution among heirs at law, quitclaim deed from an heir to defendant is admissible against administrator to prevent recovery of distributive share of that heir in the land. 147/37, 38 (6) (92 S. E. 863).

§ 4190. (§ 3610.) Ancient deed.

Age: Existence of deed attested by unofficial witnesses, offered as ancient document, for more than thirty years must be made to appear independent of the purporting date. 143/756 (1) (85 S. E. 917).

Muniments: Where plaintiff relied on prescriptive title, ancient deeds not

connected with plaintiff's chain of deeds were inadmissible though offered in connection with parol evidence that such deeds were included among a number of others handed down to him as muniments of title by his predecessors. 140/207 (3) (78 S. E. 846).

§ 4191. Copies established, how.

Charge in proceeding by heir at law to establish lost deed that if deed was made as claimed it would be immaterial as to how remainder of property existed, if there was any property left, was not erroneous. 145/137, 138 (7) (88 S. E. 669).

Evidence: Testimony of plaintiff that intestate died in the county and there was no administration upon her estate held admissible, though no allegation to that effect was made in petition. 145/137, 138 (4-a) (88 S. E. 669.)

Where, in proceeding to establish lost deed, it was alleged and submitted that original deed was never recorded,

evidence of unexplained mutilation of record covering period following date of deed was irrelevant for purpose of being considered in connection with testimony that deed had been carried to county seat and returned with statement that it was recorded. 145/137, 138 (5) (88 S. E. 669).

Parties: Under sections 3657 and 3929 heir of grantee in unrecorded deed has such interest in land as will authorize him to maintain action under this section and section 5314 to establish copy of deed after it has been lost. 145/137, 138 (4) (88 S. E. 669).

§ 4191 (a). **Execution of bonds for title, etc.** [Every bond for title, bond to re-convey realty, contract to sell or to convey realty, or any interest therein, and every transfer or assignment of any of such instruments shall, except as between the parties thereto, be executed with the same formality as is now required by the laws of this State for the execution of deeds conveying realty.]

Acts 1921, pp. 157, 158.

Of covenants and warranty.

ARTICLE 2.

Of Covenants and Warranty.

§ 4192. (§ 3612.) Covenants running with lands go to purchaser.

Breach: Under sections 4136, 4192, 4194, where deed contains general covenant of warranty, in which there is no restriction as to transmission of covenant, remote grantee can maintain action against first grantor for breach of covenant based on possession by another under older deed from grantor. 145/347 (1) (89 S. E. 199).

Charge: Under evidence in action for breach of railroad company's covenant to construct side track and erect warehouse at certain point, instruction on liability of defendant company which had taken over the property pursuant to a contract of consolidation with defendant covenantor held not erroneous. 13 App. 357, 358 (8) (79 S. E. 187).

Easement: Where owner of land sold portion of it, deed reserving right to use thirty feet on one side for purpose of hauling logs and loading logs and lumber so long as he owned remainder of land and operated sawmill on it, and stipulating "that this right of use shall not interfere with business of grantee or his heirs or assigns in or to property conveyed," the covenant of easement ran with the land. 146/694 (1) (92 S. E. 220).

Evidence here authorized submission to jury whether corporation formed by covenantors for free telephone service assumed or became bound by covenant. 140/743, 744 (4) (79 S. E. 846).

In suit against grantee and its assignee for breach of covenant running with land and requiring location of railroad station at certain point, deed executed by grantee to its assignee subsequently to filing of suit was admissible, where, before the commencement of suit assignee was in possession and control of the property. 13 App. 357, 358 (8) (79 S. E. 187).

Intention: Covenants are to be so construed as to carry into effect the intention of the parties, which intention should be collected from the whole instrument and circumstances surround-

ing its execution. 13 App. 357, 358 (5) (79 S. E. 187).

Interest: To constitute covenant running with the land, covenant must have a relation to the interest or estate conveyed, and act to be done must concern the interest created or conveyed; not necessary that privity of estate shall exist between original grantor and purchaser from covenantee. 13 App. 357 (2) (79 S. E. 187).

Jury: Under conflicting evidence in action for breach of railroad company's covenant to construct side track and erect warehouse, questions whether spur track was a side track, and whether placing of box car near the spur track after commencement of suit was construction of a warehouse within the covenant was for the jury. 13 App. 357, 358 (8) (79 S. E. 187).

Party walls: Party wall agreement contained in deeds by tenants in common of two adjoining lots constituted covenant running with each lot. 142/489 (1) (83 S. E. 204).

Personal covenant in 99-year lease of portion of telephone system, which bound the lessees, their heirs and assigns, to give free service to lessors over all their lines, not binding on purchaser from lessees. 140/743 (3) (79 S. E. 846).

Personal covenant is one having no relation to land conveyed. 13 App. 357, 363 (79 S. E. 187).

Prior warrantors: Purchaser at sale by grantee of deed given as security, grantor having defaulted, may, though he be grantee himself, and has never obtained possession, sue any prior grantor upon his warranty. 14 App. 382 (2) (80 S. E. 904).

Purchase price: Answer, in ejectment suit by vendor against vendee praying for accounting for amount paid by defendant on purchase price of land set up substantial equity and was sufficient as a basis for a decree. 148/418 (2) (96 S. E. 993).

Of covenants and warranty.

If upon accounting prayed by defendant vendee in ejectment suit by vendor it should be determined that defendant had fully paid purchase money, she would be entitled to relief prayed; if it should be determined that she had not fully paid purchase price, she would be entitled, upon payment of balance due, to decree for portion of land to which plaintiff could execute title in conformity with this bond. 148/418 (2) (96 S. E. 993).

Railroad company: Grantee, by accepting deed obligating it to construct railroad and build side track and warehouse, entered into covenant to comply with such obligation, which covenant ran with the land and became obligatory upon its assignee. 13 App. 357 (3) (79 S. E. 187).

Where railroad company, pursuant to consolidation agreement, takes over property of another company, which property is subject to a covenant running with the land, requiring building of side track and warehouse, and where it proceeds to operate and manage same, it may be held liable for breach of the covenant, though the property is not formally transferred to it until after commencement of the suit. Id. 357 (4).

§ 4193. (§ 3613.) No implied warranty.

Marketable title: Answer herein action for price of land did not involve marketability of plaintiff's title. 144/43 (1) (85 S. E. 1039), citing 5 Words and Phrases.

Fact that defendant in action for

§ 4194. (§ 3614.) General warranty.

Cited. 141/126 (1) (80 S. E. 630); 144/372, 373 (87 S. E. 301).

After-acquired title: Covenant of warranty in deed purporting to convey bare possibility will not inure to benefit of purchaser or his heirs so as to subject to covenant after-acquired property of vendor. 144/395 (1-a) (87 S. E. 479).

Breach: Under sections 4136, 4192, 4194, where deed contains general covenant of warranty, in which there is no restriction as to transmission of covenant, remote grantee can maintain ac-

Timber: Covenants in lease contract between receivers of deceased person and lumber company, under which company was to construct and maintain, on land to be purchased from receivers, a sawmill, to be situated on certain railroad, and to ship lumber over such railroad, in consideration of construction of railroad near where timber was situated, did not run with the land, but were personal covenants, and injunction will not lie at instance of receivers and railroad to restrain cutting of timber by lessee of such lumber company and its shipment over another railroad. 148/69 (2) (96 S. E. 263).

Water: Where grantor conveyed fee of one of two tracts of land and water rights and water-power privileges of another by deed, habendum clause of which conveyed "above-granted and described property, with all and singular the rights, members, and appurtenances thereunto appertaining," to grantee, easement of water rights and water-power privileges passing under deed was that appurtenant to property conveyed and not to other property of grantee. 141/843 (1) (82 S. E. 243).

price of land made one of those besides plaintiff, who was interested in entire parcel, a party, does not destroy defense that plaintiff could not furnish marketable title. Id. 43 (3).

tion against first grantor for breach of covenant based on possession by another under older deed from grantor. 145/347 (1) (89 S. E. 199).

Construction: Covenant of general warranty of title to timber described in conveyance on which was based defendant's claim of breach of warranty is to be construed in connection with other parts of deed and with contemporaneous written agreement of party to conveyances. 20 App. 682 (1) (93 S. E. 301).

Minors: Plea, in suit on note for pur-

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chase price of land, setting up that after sale plaintiff discovered that her minor sons had interests in the land, which she could not convey, and that she agreed to accept from defendant notes for stated amounts, payable to the minors respectively, amounts of which notes were to be deducted from note in suit, was not subject to demurrer. 146/148, 149 (1) (90 S. E. 863).

Possibility: Covenant of warranty in void deed purporting to convey only present rights in and title to all interests that grantor has or may become possessed of by inheritance or deed from his mother, then living, was not enforceable. 144/395 (2) (87 S. E. 479).

Rescission: Purchaser in undisturbed possession under vendor's bond for title can not recover partial payment solely for defect in title, or unless vendor is insolvent or a non-resident, or it be inequitable for him to hold money paid and collect balance. 143/547 (85 S. E. 741).

§ 4195. (§ 3615.) **General warranty of land covers known defects.**

Cited. 141/126 (1) (80 S. E. 630);
144/372, 373 (87 S. E. 301).

§ 4197. (§ 3617.) **Burden of proof.**

Eviction: Burden is upon plaintiff to show eviction by reason of a paramount outstanding title. 141/123 (1) (80 S. E. 901).

Where paramount title is so asserted

Purchaser of land in undisturbed possession under absolute warranty deed can not have rescission and recover from grantor partial payments made on purchase price, or have damages covering costs of improvements on land, solely upon ground of defect in title; such relief depends upon grantee's equitable right of rescission or cancellation, which does not exist unless he allege that grantor is insolvent or a non-resident, or allege fraud, mutual mistake, or some other fact making it inequitable for grantor to hold purchase money paid and to collect balance. 146/749 (2) (92 S. E. 213).

Settlement: Plea that plaintiff had settled with defendant's warrantor for stated sum, and that this released defendant, was demurrable, where it did not show for what amount the person settled with would have been liable or extent of injury done defendant by making of such settlement. 143/421, 422 (3) (85 S. E. 338).

that warrantee must presently yield to it, he may purchase from true owner, and this will be sufficient eviction to constitute breach. 14 App. 303 (4) (80 S. E. 735).

ARTICLE 3.

Of Registration.

§ 4198. (§ 3618.) **Deeds, when and where recorded.**

Administrator: Administrator's deed duly executed and recorded, reciting order to sell, sale, and valuable consideration, and conveying certain lot, except widow's dower, and certain other land, was notice to subsequent purchasers that vendee and those who held under him took only the last mentioned land; and one who acquired possession of entire lot under pre-

tended claim, including remainder in dower, would acquire no title to such remainder as against heirs at law, who sue in ejectment for such remainder within seven years from date of death of tenant in dower. 147/315, 316 (2-b) (93 S. E. 895).

Benefit of public is object of registration laws. 140/48, 50 (78 S. E. 467).

Bond for title: The obligee in a recorded

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bond is protected to the extent of purchase money actually paid before notice of the rights of a grantee in a senior unrecorded deed from the obligor in the bond; the recorded bond for title does not take priority over the unrecorded senior deed to the extent of the entire estate purchased. 149/220, 221 (1-b) (100 S. E. 72).

Broker: Written instrument giving broker exclusive right to sell land, and agreeing to pay commission, not recordable by superior court clerk. 140/48 (1) (78 S. E. 935).

Instrument, even if a recordable paper when properly attested, could not properly be recorded on affidavit of promisee that he saw promisor sign it. Id. 48 (2).

Cancellation: Record of instrument not properly recordable not cancelled as matter of course, in absence of statute; right will be determined under general law governing right to have instruments cancelled. 140/48 (4) (78 S. E. 467).

Effect: The registry of a deed serves dual purpose; it is constructive notice of the existence of the original deed, and permits its reception in evidence without proof of its execution. 20 App. 175 (1) (92 S. E. 957).

Evidence by purchaser from party who had covenanted to pay part of cost of party wall that he had no actual notice of the covenant was properly excluded, where the covenant was contained in properly executed and recorded deeds. 142/489 (3) (83 S. E. 204).

Where plaintiff in ejectment relied on deed based on sale made at public outcry in pursuance of power in duly recorded mortgage, and defendant relied on unrecorded deed from mortgagor, junior to mortgage, but senior to plaintiff's deed, parol testimony as to transaction between defendant and mortgagor and mortgagee, whereby the land was sold by mortgagor by consent of mortgagee to defendant and purchase price paid to mortgagee, was admissible in connection with other testimony as to notice to plaintiff of the unrecorded deed. 149/660 (1) (101 S. E. 753).

Failure: Under Code 1882, section 2705, where before enactment of section 3320, in 1889, there was a contest between two deeds, neither of which was recorded within 12 months, the older deed prevailed. 143/98, 100 (6) (84 S. E. 426).

Junior deed: Properly executed and recorded deed supported by valuable consideration has priority over older unrecorded deed of which grantee in younger deed had no notice. 142/806 (1) (83 S. E. 941).

Fact that junior deed was filed for record within a year and recorded before senior deed did not entitle it to a preference, where it was not actually recorded until after expiration of the year. 143/98, 100 (7) (84 S. E. 426).

Senior unrecorded deed loses its priority over junior recorded deed for value from same vendor, taken without knowledge or notice of the existence of the senior deed; to destroy title of purchaser for value, acquired by prior registry, it is essential that purchaser should have notice of a prior subsisting outstanding title. 149/103 (1) (99 S. E. 437).

Notice: It was not error to charge that if defendant purchased land in controversy from his mother, for valuable consideration, and if he had no actual notice of previous deed claimed by plaintiff to have been made by the owner, and was what law calls an innocent purchaser, he should get good title to the land. 146/421 (3) (91 S. E. 469).

Party walls: Party wall agreement, contained in duly executed and recorded deed by tenants in common, was notice of such agreement to subsequent purchasers. 142/489 (2) (83 S. E. 204).

Voluntary conveyance: Voluntary deed, though duly recorded, and taken without notice of prior voluntary deed executed by same grantor and not recorded, does not give to second grantee a priority over the first; doctrine of constructive notice applies only to deeds made for valuable consideration. 146/421 (2) (91 S. E. 469).

While as abstract principle of law, it was error to reject certain voluntary

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deeds which had been recorded, such error was harmless where record thereof was not notice to innocent third person who acquired for valuable con-

sideration contract lien against the property; actual notice is required in order to give priority to voluntary deed. 147/24 (1) (92 S. E. 533).

§ 4202. (§ 3620.) **Deeds, how attested for record.**

Attorney: That an attorney prosecuted to judgment a suit on a note, payment of which was secured by deed, did not render him incompetent as an attesting witness to the deed executed pursuant to this section and reconveying the property to the debtor for the purpose of levying a sale under such judgment. 141/329 (1) (80 S. E. 996).

Attorney at law who is notary public, and who negotiates loan and receives fee from party therefor, is not disqualified, on account of interest, from acting as official attesting witness to the deed. 145/580 (2) (89 S. E. 740).

Broker's contract: Instrument giving broker exclusive right to sell land and agreeing to pay commission even if a recordable paper when properly attested, could not be properly recorded on affidavit of promisee that he saw promisor sign it. 140/48 (1) (78 S. E. 935).

Corporation: Where deed is signed with name of domestic corporation and by

its president and secretary, and its corporate seal is affixed, and only signature of secretary is properly attested, such deed is admissible to record, and such record is notice to subsequent purchasers of property conveyed. 147/654 (1) (95 S. E. 211).

Scope: The recording acts only authorize the clerk of the superior court to record such papers as are entitled to record and which had been attested in manner and form as the statute prescribes. 20 App. 175 (1) (92 S. E. 957).

Title: Although deed may not be properly attested or probated to authorize its record, this will not prevent it from conveying title as against grantor and heirs. 145/215 (1) (88 S. E. 947).

Trustee: Where one in individual capacity was grantor, and, as trustee of church, was grantee, his attestation of deed with unofficial witness was not sufficient to authorize deed to be recorded. 144/845 (1) (88 S. E. 199).

§ 4202 (a). **Presumption of due attestation rebuttable.** [Wherever any deed, mortgage or other registerable instrument appears by its caption only to be executed in one county, and the official attesting witness appears to be an officer of another county, not having jurisdiction to witness deeds in the county named in the caption, the prima facie presumption shall be that the said deed was attested by the officer in the county in which he had authority to act, the caption to the contrary notwithstanding. Such deeds, mortgages and other instruments shall be held prima facie entitled to record, but this presumption may be rebutted by due proof: Provided, that the terms of this law shall not apply to any pending litigation.]

Acts 1918, p. 209.

§ 4203. (§ 3621.) **If attested out of this State.**

Caption: Mortgage on lands in Georgia, executed in Florida, attested by notary of the State in accordance with this section, caption reading "Georgia, Colquit County," which was place where

lands were located, entitled mortgagee to priority upon bankruptcy of mortgagor. 224 Fed. 984 (1); s. c. 35 A. B. Rep. 459.

Re-execution: Where deed insufficiently

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executed outside the State is properly re-executed within the State and re-

corded it is competent evidence of title. 142/850 (3) (83 S. E. 955).

§ 4208. (§ 3626.) **Bills of sale to personalty.**

Stated. 16 App. 424 (1) (85 S. E. 617).

§ 4210. (§ 3628.) **Deed evidence, when.**

Stated. 145/215 (1) (88 S. E. 947); 13 App. 419 (2) (79 S. E. 225).

Administrator: Deed here was properly admitted in evidence over objection that it did not sufficiently describe land and was not accompanied by sufficient order from court of ordinary. 143/98, 100 (5) (84 S. E. 426).

Deed was inadmissible where description was indefinite without parol proof, and testimony was that land in controversy was not embraced therein. 143/727 (2) (85 S. E. 874).

Affidavit of forgery, as contemplated by this section, is special pleading to be employed solely as basis for raising and trying issue as to genuineness of recorded deed offered in evidence on trial of another case. 145/84 (1) (88 S. E. 550).

Alterations: Prima facie any alteration which appears in registered deed will be presumed to have been made by the parties at or before time of execution of deed; in absence of affidavit of forgery, such registered deed is admissible in evidence without explanation of alteration. 146/721 (2) (92 S. E. 67).

Amendment to petition in action for land by administrator, alleging record of deed by plaintiff's intestate to third person, that such deed is forgery, and that third person is in collusion with defendant in withholding possession, is not statutory affidavit of forgery, though sworn to by plaintiff "to the best of his knowledge and belief." 145/84 (1-a) (88 S. E. 550).

Burden: Where affidavit of forgery was filed to recorded deed offered in evidence, and two of attesting witnesses were dead, plaintiff should prove actual signing by alleged maker, or genuineness of his signature, or that such evidence was not attainable 142/120 (1) (82 S. E. 531).

Where amendment to petition in action for land alleges that recorded

deed is forgery, burden of proof on such issue is on plaintiff, in absence of affidavit of forgery. 145/84, 85 (2) (88 S. E. 550).

When affidavit of forgery was filed, burden of proving genuineness of deed was upon party who offered it in evidence. 147/598 (5) (95 S. E. 11).

Certificate from executive department showing that at execution of deed no person of name subscribed to deed as justice of the peace was a justice, was sufficient, in absence of rebutting evidence to show that deed was forgery. 142/725, 727 (3) (83 S. E. 683).

Charge that there was only one issue, and that was whether defendant executed deed introduced, which plaintiff relies on for a deed and defendant says is a mortgage, was erroneous. 142/126 (1) (82 S. E. 522).

In action to quiet title, wherein defendant alleged that deed relied on by plaintiff was forgery, charge as to possession of plaintiff's grantor and as to admissions of a defendant were erroneous. 147/598 (4) (95 S. E. 11).

Evidence: Where defendant claimed that deed on which plaintiff relied was a forgery, mortgage to the grantee under such deed from defendant was relevant. 142/126 (1) (82 S. E. 522).

Agent of alleged grantee could not testify that price asked for land generally of the grantee, owning other lands in the community, was much under the actual value thereof. *Id.* 126 (2).

On special issue of forgery, sole question being as to factum of deed, it was erroneous to admit in evidence deed to intestate reciting that land conveyed was same as that conveyed to grantor by alleged forged deed. 147/598 (3) (95 S. E. 11).

The registry of a deed serves a dual function; it is constructive notice of the existence of the original deed, and permits its reception in evidence with-

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out proof of its execution. 20 App. 175 (1) (92 S. E. 957).

Jury: In action to quiet title wherein defendant tendered issue of forgery and consented to trial of such issue separately before the jury, there was no error, after verdict against defendant, in ordering trial of main case before same jury, 147/598 (2) (95 S. E. 11).

New trial: In action to quiet title, where defendant's affidavit of forgery, tendered under this section, was found against him, and same jury returned directed verdict for plaintiff in main case, though only one motion for new trial was made, assignment of error, based on rulings as to all issues, will be considered where there has been no motion to dismiss motion for new trial. 147/598 (1) (95 S. E. 11).

Though losing party, on trial of special issue as to genuineness of deed offered in evidence on trial of petition for partition of realty, may file motion for new trial and except to judgment denying such motion, that judgment can not be reviewed in Supreme Court while main case is pending in court below. 148/271 (96 S. E. 563).

Partnership: Deed from a firm to defendant properly admitted here, as against objection that it was not ex-

ecuted by all of the partners as tenants in common. 141/367 (1) (80 S. E. 1002).

Probate: Deeds of timber lands, some of which were recorded upon insufficient probate, and others not recorded, produced by defendants under notice to produce, are admissible in evidence without further proof of execution, in action against administrator and heirs for breach of contract. 145/616, 617 (4) (89 S. E. 689).

Sheriff's deed is inadmissible to show transfer of title when not accompanied by the execution or judgment on which it is founded. 143/738 (2) (85 S. E. 877).

Unrecorded deed: Where, in action to enjoin defendant from polluting stream, title to certain land, upon which plaintiff predicated his rights, was in dispute, it was error to admit in evidence as to such title two unrecorded deeds, execution of which had not been proved. 141/790 (2) (82 S. E. 241).

Verdict: Where rulings in equitable action to quiet title required that verdict on collateral issue of forgery be set aside, court would direct that verdict in main case be set aside and case reinstated. 147/598, 599 (7) (95 S. E. 11)

§ 4212. (§ 3630.) Copy when evidence.

Loss: It was not error to exclude certified copy of deed, where it was not shown whether inquiry was made of heirs of administrator of grantor as to loss of original deed, in order to lay foundation of secondary evidence. 146/310 (6) (91 S. E. 104).

Record: No question as to correctness of record being involved, original

record not admissible, over objection, to show contents of lost deed. 140/610 (1-a) (79 S. E. 486).

Registered deeds: Certified copy or deed attested by justice of peace who was individual grantor, and, as trustee, grantee, was not admissible in evidence. 144/845 (1) (88 S. E. 199).

§ 4213. Bonds for title may be recorded.

Cited. 16 App. 669, 671 (85 S. E. 986); 250 Fed. 899, 903.

Bona fide purchaser: The rule in equity as to the concurrence of certain conditions in order to constitute one a bona fide purchaser is applicable in the construction of the act relating to the registry of bonds for title. 149/220 (1-a) (100 S. E. 72).

Purpose: The primary intent and pur-

pose of the act is to give notice to all persons dealing with the obligor, from the date of filing bond, of interest and equity of holder of bond in property therein described, so that anyone acquiring lien on or title to the property after filing of bond would take property subject to the interest and equity of the obligee. 149/220 (1-a) (100 S. E. 72).

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§ 4214. Record is notice of the holder's interest.

Cited. 250 Fed. 899, 903.

§ 4215. Satisfaction, how entered of record.

Cited. 250 Fed. 899, 903.

§ 4215 (1). Record of bonds for title, etc. Priority over deeds, etc. [Every bond for title, bond to re-convey, contract to sell or convey realty, or any interest therein and any and all transfers or assignments thereof, shall be filed and recorded in the office of the clerk of the superior court of the county where the land referred to therein lies. The filing and recording may be made at any time, but such bond for title, bond to re-convey, contract to sell or convey realty, or any interest therein, and any transfer or assignment thereof, shall lose its priority over deeds, loan deeds, mortgages, bonds for titles, bonds to re-convey, contracts to sell or convey realty, or any interest therein, and any transfer or assignment thereof from the same vendor, obligor, transferrer, or assignor, which may be executed subsequently, but previously filed for record, and taken without notice of the former instrument.]

Acts 1921, p. 158.

CHAPTER 8.**Registration of Land Titles.**

§ 4215 (a). Name of law. [This law shall be known as "The Land Registration Act," and may be cited or referred to by that name.]

Acts 1917, p. 108.

§ 4215 (b). Superior court's jurisdiction. [For the purpose of enabling all persons owning real estate within this State to have the title thereto settled and registered as prescribed by the provisions of this Chapter, the superior court of the county in which the land lies shall have exclusive original jurisdiction of all petitions and proceedings had thereupon.]

Acts 1917, p. 108.

§ 4215 (c). Words defined. [As used in this Chapter, the following words shall have the following meanings, unless the context plainly indicates otherwise:

The words "registered land" shall include any estate or interest in lands which shall have been registered under the provisions of this Chapter.

The words "the court" shall mean the superior court of the county wherein the land lies.

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The word “clerk” shall mean the clerk of the superior court of the county wherein the land lies, and shall include his lawful deputies, and any person lawfully acting as clerk under the provisions of the general laws of this State, or of this Chapter.

The words “judge” or “judge of the court” or “judge of the superior court” or “judge of the superior court of the county wherein the land lies,” or words of similar purport, shall be held and construed to mean, embrace, and include any judge of the superior court of this State, presiding in the superior court of the county where the land lies; and while it is intended that as a usual matter the judge of the superior court of each circuit shall be the judge who shall act upon and sit in the various matters arising in that circuit with which the judges of such courts are charged under the provisions of this Chapter, still as to such matters any judge of the superior court shall have jurisdiction to perform the functions of judge under this Chapter; and in the event that the judge of the superior courts of the circuit in which the transaction or matter arises is disqualified, absent from the circuit, ill, dead, or from any other cause cannot act in the matter, it shall be the duty of any other judge of the superior court of the State, to whom the matter is presented, to act in the matter to the same extent as if the same arose in one of the counties of his own circuit; and furthermore, any judge of the superior court may, in any matter arising under this Chapter, upon the request of the judge of the superior court of the circuit in which it arose, act upon it as if it arose in his own circuit.

The words “voluntary transaction” shall be construed to embrace and mean all contractual and other voluntary acts or dealings (except by will) by any registered owner of any estate or interest in land, with reference to such estate or interest and any right of homestead or exemption therein; and the words “involuntary transaction” shall be construed to embrace and mean all other transmission of registered land or any interest therein and all other rights or claims, judicial proceedings, liens, charges, or encumbrances not created directly by contract with the registered owner, but arising by operation of law or of equitable principles, dower, the exercise of the right of eminent domain, delinquent taxes and levies, and all like matters affecting registered land or any interest therein.]

Acts 1917, pp. 108-110.

§ 4215 (d). **Proceedings in rem.** [The proceedings under any petition for the registration of land, and all proceedings in the court in relation to registered land, shall be proceedings in rem against the land, and the decree of the court shall operate directly on the land, and vest and establish title thereto in accordance with the provisions of this Chapter, as well

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as upon all persons who are parties to said proceedings, whether by name or under the general designation of "whom it may concern."']

Acts 1917, p. 110.

§ 4215 (e). **Registration suit; parties, pleading, and practice.** [Suit for registration of title shall be begun by a petition to the court by the person or persons or corporation claiming, singly or collectively, to own or to have the power of appointing or disposing of an estate in fee simple in any land, whether subject to liens, encumbrances, or lesser estate, or not. Infants and other persons under disability may sue and defend by guardian, guardian ad litem, next friend, or trustee, as the case may be. Except as otherwise provided, the suit shall be subject to the general rules of equity pleading and practice.]

Acts 1917, p. 110.

§ 4215 (f). **Interest less than fee.** [Any person in the possession of lands within the State, claiming an interest or estate less than the fee therein, may have his title thereto established under the provisions of this Chapter, without the registration and transfer features herein provided.]

Acts 1917, p. 110.

§ 4215 (g). **Petition; names and addresses, non-residents, description of land, and amendment.** [The petition, and amendment thereto, shall be signed and sworn to by each petitioner, or, in the case of a corporation, by some officer thereof, or, in the case of a person under disability, by the person filing the petition. It shall contain a full description of the land and its valuation and its last assessment for county taxation; shall show when, how, and from whom it was acquired, a description of the title by which he claims the land, and an abstract of title, and shall state whether or not it is occupied; and shall give an account of all known liens, interests, and claims, adverse or otherwise, vested or contingent. Full names and addresses, if known, of all persons that may be interested in any wise, including adjoining owners and occupants, shall be given. A non-resident petitioner shall appoint a resident agent or attorney upon whom process and notices may be served. The description of the premises to be given in the petition shall be in such terms as shall identify the same fully, and shall be such a description as shall tend to describe the same as permanently as is reasonably practicable under all the circumstances. If it be in a portion of the State in which the land is by State survey divided into land districts and lot numbers, in the petition there shall be stated the number of land district and of the lot number or numbers in which the tract is contained. The judge, on his own motion or upon recommendation of the examiner, may, before passing a decree upon any petition for registration, require a fuller and more adequate

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description, or one tending more permanently to identify the tract in question, to be included into the petition by amendment, and if, in the discretion of the court, it shall be necessary, may, for that purpose, require a survey of the premises to be made and the boundaries marked by permanent memorials. The acreage or other superficial contents of the tract shall be stated with approximate accuracy; and where reasonably practicable, the court may require the metes and bounds to be stated.]

Acts 1917, p. 110.

§ 4215 (h). **Separate parcels.** [Any number of separate parcels of land, claimed by the petitioner under the same general claim of title, and lying in the same county, may be included in the same proceeding; and any one tract may be established in several parts, each of which shall be clearly and accurately described and registered separately.]

Acts 1917, p. 111.

§ 4215 (i). **Parties defendant.** [The petition shall include as defendants all persons who by the petition are disclosed to have any heir, interest, equity, or claim adverse to the petitioner or otherwise, vested or contingent, upon said land or any interest therein, and shall also include as defendants all other persons "whom it may concern."]

Acts 1917, p. 111.

§ 4215 (j). **Process, service; publication of notice; non-residents; infants, etc.** [Upon such petition being filed in the office of the clerk of the superior court in the county where the land lies, the clerk shall issue a process directed to the sheriffs of this State and their lawful deputies, requiring all of the defendants named in the petition, and all other persons "whom it may concern," to show cause before the court, on a named day not less than forty or more than fifty days from the date thereof, why the prayers of the petition should not be granted, and why the court should not proceed to judgment in such cause; and shall make the necessary copies of the petition and process for service. Within thirty days from the time of the issuance of process, a copy of the petition and process shall be served, in like manner as ordinary process is served in ordinary actions at law, upon each party named as defendant in the original petition, if a resident of this State. Second original and copies may issue and be served in like manner as second originals are issued and copies served in ordinary actions. The clerk of the superior court shall also cause to be inserted in the newspaper in which the advertisements of sheriff's sales in the county are advertised, for four insertions in separate weeks, a notice addressed "to whom it may concern," and also to each person named in the petition as a defendant who resides beyond the limits of the State, or whose place of residence is unknown, and giving notice of the filing of the petition by the petitioner, and a description

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of the land which petitioner seeks to register, and warning them to show cause to the contrary, if any they can, before the court on the date named in the process. The judge of the court may grant additional time for service or return of the process, and may provide for service in cases not herein provided for, wherever the exigencies of justice may so require. Wherever the petition discloses, or it otherwise becomes disclosed to the court in the progress of the proceedings, that any non-resident is interested, such non-resident, if his post-office address be known, shall be notified also by the clerk of the court mailing to him a copy of the petition and process by registered mail to the post-office address as the same may be disclosed to the court through the petition or other proceedings in the case. Guardians ad litem shall be appointed for infants and other persons under disability, in like manner as they are appointed in equity cases in the general practice in this State.]

Acts 1917, p. 112.

§ 4215 (k). **State, county, or municipality, how served.** [If the petition discloses that it involves the determination of any public right or interest of this State, or of any county or municipality thereof, the process or notice, in order to affect the State or the county or the municipality, shall be served upon the attorney-general, in the case of the State; upon the ordinary, in the case of a county (or, if the ordinary be disqualified, upon the clerk of the superior court); or upon the mayor of the municipality, in the case of a municipality (or, in case there is no mayor or the mayor is disqualified, upon a majority of the members of the council or other governing body of the municipality).]

Acts 1917, p. 113.

§ 4215 (l). **Waiver of service.** [Any person entitled to notice or service of process under this Chapter may waive such notice or service by a written acknowledgment of service, or waiver of service, entered upon the petition or entitled in the cause and signed by him in the presence of the judge of the superior court or of the clerk of the superior court of the county, or the examiner, his signature being attested by such officer.]

Acts 1917, p. 113.

§ 4215 (m). **Judgment conclusive. False return, etc.** [The court, before passing the decree authorizing the registration of land, shall first satisfy himself that publication of notice and service of process, as herein required, have been made. After judgment the entry of service by the sheriff or his deputy shall be conclusive evidence and shall not be subject to traverse, nor shall any acknowledgment of service be subject to traverse. The recital of service of process and of the giving and publishing of notices, contained in the decree or final judgment in the cause,

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shall be conclusive evidence that such service, publication, and notice have been legally given; provided, however, that nothing herein shall prevent any person aggrieved from having his right of action against any sheriff who makes a false return of service, or against any clerk or examiner who falsely attests a waiver or acknowledgment of service, or any clerk who fails to publish the notice or to mail the notice as required by this Chapter.]

Acts 1917, p. 113.

§ 4215 (n). **Notice; posting, service, conclusiveness, waiver. Sheriff to ascertain occupants.** [A notice similar to the notice directed to be published, as provided in section 4215 (j), shall also be delivered by the clerk to the sheriff of the county, or one of his lawful deputies; and the sheriff or his lawful deputy shall, within thirty days from the date the petition is filed, post the same upon the land in some conspicuous place; and if there be more than one tract of land, enough notices shall be furnished by the clerk to the sheriff or his deputies, and he shall post the same upon each tract of land included in the petition. The sheriff shall also, within said thirty days, go upon the land and ascertain and make official return to the court, stating the names of each and every person above the age of fourteen years actually occupying the premises, together with the postoffice addresses of such persons. Upon such return being made, the clerk shall thereupon mail, by registered mail, to each person so upon the land a copy of the petition and process, or, if the petitioner so desires, he may require such persons so upon the land to be served by the sheriff or his deputy. The clerk shall make entry of having mailed the notices unless the sheriff shall have made the service, in which event the sheriff shall make the return. The notices provided for and to be given under this and other sections of this Chapter shall stand as personal service of process, and shall be conclusive and binding on all persons so notified, and on all the world. Appearances or pleading in the case shall constitute a waiver of process and service, and of notice and of any defect therein.]

Acts 1917, p. 114.

§ 4215 (o). **Examiners; appointment, qualifications, oath, removal.** [The judge of the superior court of each judicial circuit in this State shall appoint at least one master, or auditor, who shall be known as the examiner, and who shall discharge the duties provided herein for the examiner, but whose relation and accountability to the court shall be that of auditor or master in the general practice existing in this State; and the judge shall appoint as many more examiners in the circuit as the public convenience in connection with the carrying out of the provisions of this Chapter may require, and may in any case appoint a special

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examiner. Such examiners shall hold office at the pleasure of the judge, and shall be removable at any time with or without cause. Each examiner so appointed must be a competent attorney at law, of good standing in his profession, and of at least three years' experience in the practice of law. Each examiner shall take and file in the office of the clerk of the superior court of the county of his residence, along with the order of his appointment, an oath or affidavit substantially in the form herein prescribed.]

Acts 1917, p. 114.

§ 4215 (p). **Reference. Preliminary report of examiner. Prima facie evidence.** [Upon the filing of a petition, as provided in this Chapter, the clerk shall at once notify the judge, who shall refer the cause to one of the general examiners or to a special examiner. It shall thereupon become the duty of such examiner to make up a preliminary report containing an abstract of the title to the land from public records and all other evidences of a trustworthy nature that can reasonably be obtained by him, which said abstract shall contain full enough extracts from the records, and other matters referred to therein, to enable the court to decide the questions involved; also a statement of the facts relating to the possession of the lands; also containing the names and addresses, so far as he is able to ascertain, of all persons interested in the land, as well as all adjoining owners, showing their several apparent or possible interests, and indicating upon whom and in what manner process should be served or notices given, in accordance with the provisions of this Chapter. The preliminary report of the examiner shall be filed in the office of the clerk of the superior court, on or before the return day of the court, as stated in the process, unless the time for filing the same shall be extended by the court; and the said report shall be prima facie evidence of the contents thereof.]

Acts 1917, p. 115.

§ 4215 (q). **Additional notices.** [If it is disclosed, from the report of the examiner, that other persons than those who shall have been notified under the provisions of this Chapter are entitled to notice, a copy of the petition shall be served upon such person in like manner as other persons named as defendants in the petition are required to be served by this Chapter, and, in addition to the copy of the petition, there shall be attached a notice from the clerk, directed to such person, informing him that he shall appear and show cause against the judgment being rendered in the case, if any he has, within ten days from the date of the service of the notice. However, nothing herein shall be construed to require the giving of additional notice by publication, otherwise than in this Chapter

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provided for, to non-residents or persons who, by reason of absence from the State, or by reason of their whereabouts being unknown, can not be found and served with process.]

Acts 1917, p. 115.

§ 4215 (r). **Objections and cross-action.** [Any person, whether notified or not, may become a party to the proceeding for the purpose of filing objections to the granting of the relief prayed for in the petition, or any part thereof, by filing in court an answer, showing that he claims some interest in the premises, and the grounds of his objection; or he may file a cross-action praying that the title to the land, or some interest therein, be decreed to be in him, and registered accordingly.]

Acts 1917, p. 116.

§ 4215 (s). **Hearing and report. Notice.** [As soon as practicable, after the return day stated in the process, the examiner shall proceed to hear evidence and make up his final report to the court, unless it shall have developed, from the preliminary report filed by him, that persons other than those named as defendant in the original petition were entitled to service or notice, in which event he shall not begin the hearing until after ten days from the date of the service of notice upon such persons. He shall give notice of the time and place of hearing to the petitioner and to such persons as shall have filed any pleading in the case.]

Acts 1917, p. 116.

§ 4215 (t). **Powers of examiner. Report. Evidence. Notice. Exceptions. Jury trial. Continuance. Verdict. Procedure. New trial. Re-committal.** [At the time and place set for the hearing the examiner shall, in like manner as other auditors or masters in chancery, proceed with similar powers as to the compelling of the attendance of witnesses, the production of books and papers, and of adjournment and recessing to hear all lawful evidences submitted. In addition thereto he is empowered to make such independent examination of the title as he may deem necessary. Upon his request the clerk shall issue commission for the taking of testimony of such witnesses as, under the provisions of law on that subject, may have their testimony taken by interrogatories in ordinary actions. He shall also have the powers of a commissioner appointed by the superior court under sections 5910 to 5917, inclusive. Within fifteen days after such hearing shall have been concluded the examiner, unless for good cause the time shall be extended by the judge, shall file with the clerk a report of his conclusions of law and of fact, setting forth the state of the title, any liens or encumbrances thereon, by whom held, the amounts due thereon, together with the abstract of title to said land, and any other information affecting its validity, and a brief or a stenographic report of the evidence taken by him. He shall mail to each of the parties who have

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appeared in the cause notice of the filing of his report. Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions to the conclusions of law or of fact or to the general findings of the examiner. The clerk shall thereupon notify the judge that the record is ready for his determination. If the petitioner, or any contestant of petitioner's right, shall demand a trial by jury upon any issue of fact arising upon exceptions to the examiner's report, the court shall cause the same to be referred to a jury, either at the term of court which may then be in session or at the next term of the court, or at any succeeding term of the court, to which the case may be continued for good and lawful reasons; but it shall be the duty of the judge to expedite the hearing of the case, and not to continue it unless for good cause shown, or upon the consent of all parties at interest. The issue or issues of fact shall be tried before the jury, in the event jury trial is requested, upon the evidence reported by the examiner, except in cases where, under the provisions of law in this State, evidence other than that reported by the auditor may be submitted to the jury on exceptions to an auditor's report; and except, further, that in the case the examiner has reported to the court findings of fact based on his personal examination, either party may introduce additional testimony as to such facts, provided that he will make it appear, under oath, that he has not been fully heard and given full opportunity to present testimony on the same matter before the examiner. The verdict of the jury upon the questions of fact shall operate to the same extent as it would in the case of exceptions to an auditor's report in an ordinary case in equity. In all matters not otherwise provided for, the procedure upon the examiner's report and the exceptions thereto shall be in accordance with procedure prevailing in this State as to auditor's reports in equity and exceptions thereto. The right to grant a new trial upon any issue submitted to a jury, and right of exception to the supreme court, are prescribed. The judge may refer or recommit the record to the examiner in like manner as auditor's reports may be recommitted in any equity cause; or he may, on his own motion, recommit it to the same or any other examiner for further information and report.]

Acts 1917, p. 116.

§ 4215 (u). **No default.** [No judgment or decree shall be rendered by default so as to authorize any decree to be rendered without the necessary facts being shown.]

Acts 1917, p. 118.

§ 4215 (v). **Survey of land. Notice. Protest.** [While the cause is pending before the examiner of titles, or at any time before final decree, the judge, or the examiner with the approval of the judge, may require the land to be surveyed by some competent surveyor, and may order

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durable bounds to be set and a plat thereof to be filed among the papers of the suit. But before such survey is made all adjoining land owners shall be given at least five days' notice. The petitioner, or any adjoining owner, dissatisfied with the survey, may file a protest with the court within ten days from the time the plat is filed; and thereupon an issue shall be made up and tried as in case of protest to the return of land processions.]

Acts 1917, p. 118.

§ 4215 (w). **Dismissal.** [If in any case the petitioner so desires, or if the court is of opinion that the petitioner's title is not and can not be made proper for registration, the petition may, with leave of the court, be dismissed without prejudice, on terms to be determined by the court.]

Acts 1917, p. 119.

§ 4215 (x). **Amendments, parties, etc.** [Amendments to petitions or other pleadings, or the severance thereof, including joinder, substitution, or discontinuance of parties, and the omission or severance of any portion or parcel of the land, may be ordered or allowed by the court, at any time before final decree, upon terms that may be just and reasonable; and the court may require facts to be stated in the petition in addition to those prescribed by this Chapter. The examiner shall have these powers, subject to review by exception to his reports.]

Acts 1917, p. 119.

6 4215 (y). **Dealings pending registration.** [The land described in any petition may be dealt with, pending registration, as if no such petition had been filed; but any person who shall acquire any interest in or claim against any such land shall at once appear as a petitioner, or answer as a party defendant, in the pleadings for registration, and such interest or claim shall be subject to the decree of the court.]

Acts 1917, p. 119.

§ 4215 (z). **Decree of registration. Separate decree.** [After the record shall have been perfected and settled, the judge of the superior court shall thereupon proceed to decide the cause; and if, upon consideration of such record, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, encumbrances, etc., and declaring the land entitled to registration accordingly as he shall find, and such decree shall be entered upon the minutes of the superior court and become a part of the records thereof. If, upon consideration of the record, he finds that the petitioner is not entitled to a decree declaring the land entitled to registration, he shall enter judgment and decree accordingly. If any person shall have filed a cross-action praying for the registration of the title to be found in him, the judge may enter a decree

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to that effect, in like manner ascertaining and declaring all limitations, liens, etc., and declaring the land entitled to registration accordingly. If separate parcels are involved, the court shall render separate decree as to each parcel; and the same shall be done where the petitioner has divided a tract into separately described parcels and has accurately described each parcel for separate registration.]

Acts 1917, p. 119.

§ 4215 (aa). **Decree concludes all persons.** [Every decree rendered as herein provided, shall bind the land and bar all persons claiming title thereto or interest therein, quiet the title thereto, and shall be forever binding and conclusive upon and against all persons, including the State of Georgia, whether mentioned by name in the order of publication, or included under the general description, "whom it may concern." It shall not be an exception to such conclusiveness that the person is an infant, lunatic, or is under any disability, but said person may, in the manner provided, have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded.]

Acts 1917, p. 120.

§ 4215 (bb). **Register of decrees. Title register. Certificate to owner.** [The county commissioner, or other officer having charge of the county business, of each county shall provide for the clerk of the superior court in said county a book in which he shall enroll and register and index all decrees of title, to be known as the "Register of Decrees of Title;" also a book to be prepared, printed, and ruled in substantially the manner hereinafter provided, to be called the "Title Register," in which said clerk shall enroll, register, and index, as herein provided, the certificate of title herein provided for, and all subsequent transfers of title, and note all voluntary or involuntary transactions in any wise affecting the title to said land, authorized to be entered thereon; and they shall from time to time furnish such additional books as may be necessary. Upon the registration of such decree and certificate of title the clerk shall issue an owner's certificate of title, under the seal of his office, which shall be delivered to the owner, or his duly authorized agent or attorney.]

Acts 1917, p. 120.

§ 4215 (cc). **Entries to be signed, etc.** [Every entry made in the Register of Decrees of Title, or in the Title Register, or upon the owner's certificate, under any of the provisions of this Chapter, shall be signed by the clerk and dated with the year, month, day, hour, and minute, accurately stated.]

Acts 1917, p. 120.

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§ 4215 (dd). **Transfer of registered estate. Notation and registration.** [Whenever the whole of any registered estate is transferred or conveyed, the same may be done by a transfer or conveyance upon, or attached to, the owner's certificate of title, substantially in the form herein provided for. The same shall be signed and acknowledged or attested as if it were a deed to land, and shall have the full force and effect of a deed: Provided, that if the said sale or transfer be in trust, upon condition, with power to sell, or other unusual form of conveyance, the same shall be set out in said transfer, and shall be entered upon the Registration of Titles book as hereinafter provided. Upon presentation of the said transfer, together with the owner's certificate of title, to the clerk, it shall be duly noted and registered in the Title Register, in accordance with the provisions of this Chapter, and the certificate of title on the Title Register and the owner's certificate of title so presented shall be canceled, and a new certificate of title in the name of the transferee shall be registered on the Title Register, and a new owner's certificate of title shall be issued to the transferee, which new certificate shall refer to the former certificates just canceled.]

Acts 1917, p. 121.

§ 4215 (ee). **Part transfer. Undivided interest. Entries on register, etc.** [Whenever a part of any registered land is transferred or conveyed, the same shall be by form substantially as in case of a total transfer, but setting forth, particularly and specifically, the portion of the land transferred, if it be an undivided interest, or if it be a particular portion of the tract, describing the same accurately and definitely. In case an undivided interest is transferred, upon presentation of such transfer, together with the owner's certificate of title, the clerk shall not cancel the owner's certificate so presented nor the certificate of title on the Title Register, but shall enter a notation of such partial transfer on the certificate of title, on the Title Register, and on the owner's certificate; and said clerk shall also register upon the Title Register a certificate of title in the name of the grantee of the undivided portion of said estate so transferred, and issue to him an owner's certificate correspondingly, setting out the part or amount of land transferred, as the case may be. If the transfer be of a divided part of the land, the clerk shall first enter the fact of the transfer upon the certificate of title on the Title Register, and shall cancel the certificate of title on the Title Register and the owner's certificate of title. Thereupon he shall register new certificates of title on the Title Register, separately, the one in the name of the transferee for the portion of the tract conveyed to him, and the other to the transferor for the portion retained; and the clerk shall also issue new

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separate owner's certificate accordingly. The said clerk shall note upon the Title Register and the owner's certificate the reference and cross-reference to the certificates herein referred to.]

Acts 1917, p. 121.

§ 4215 (ff). **Conveyance to secure debt. Entries.** [Whenever the owner of any registered land shall desire to convey the same as security for debt, with power of sale without foreclosure, it may be done by a short form of transfer, substantially in the form hereinafter set forth. The same shall be signed and properly acknowledged or attested as if it were a deed to land, and shall be presented, together with the owner's certificate, to the clerk, whose duty it shall be to note upon the owner's certificate and on the certificate of title in the Title Register the name of the creditor, the amount of debt, and the date of maturity of same, and showing that a creditor's certificate has been issued therefor, and when only a part of the registered estate shall be so conveyed, the clerk shall note upon the said book and owner's certificate the part so conveyed. The clerk shall retain, number, and file away the instrument of transfer, and shall issue and deliver to the creditor what shall be known as a creditor's certificate, over his hand and seal, setting out the portion so conveyed. All registered encumbrances, rights, or adverse claims affecting the estate represented thereby, in existence at the time the creditor's certificate is issued, shall be noted thereon.]

Acts 1917, p. 122.

§ 4215 (gg). **Assignment of creditor's certificate, and surrender and cancellation thereof.** [The creditor's certificate shall be assignable or negotiable to the same extent as the note or other evidence of indebtedness secured thereby may be, but assignments or transfers of the creditor's certificate need not be noted on the Title Register. A transfer or assignment of the indebtedness shall operate to transfer the creditor's certificate securing the same, in like manner and to the same extent as is set forth in section 4276, relating to the case of transfer of indebtedness secured by mortgage, unless otherwise agreed between the parties. The creditor's certificate may be surrendered and canceled at any time by the owner thereof. It shall be the creditor's duty to surrender the same and give order for cancellation of the same when the debt is paid. If he refuses to do so he may be compelled by the court to do so, and in any proper case the judge may order a cancellation on the Title Register. Upon presentation of an order of cancellation, with the surrendered creditor's certificate, or upon presentation of the judge's order directing cancellation, the clerk shall enter a notation of the same in the Register of Titles and on the owner's certificate of title.]

Acts 1917, p. 122.

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§ 4215 (hh). **Sale to pay debt. Transfer to purchaser. Notice. Objections. Application of proceeds of sale.** [If the debt secured by the creditor's certificate so issued, or any part thereof, shall be due and unpaid, the holder of said creditor's certificate may, after advertising the property for sale in the manner prescribed by law for advertising sheriff's sales of land, expose the same at auction before the court-house door of the county, and sell the same to the highest and best bidder for cash. The sale need not be conducted by the creditor or holder of the creditor's certificate personally, but may be conducted through any agent or attorney. The holder of said certificate, his agent or attorney, shall thereupon make oath to the facts, and apply to the judge for an order of transfer to the purchaser. The application shall be accompanied by a certified copy of the certificate of title from the Title Register as of the date of the sale. The judge shall cause at least five days' notice to be given to the debtor and to any person who, according to the Title Register, shall have acquired any interest in the property subsequently to the issuance of the creditor's certificate; and if no objections are made (or after hearing, if objections be made) the judge shall grant an order of transfer, with such directions for cancellation of other certificates and entries, and otherwise as shall be in accordance with the justice of the case and with the spirit of this Chapter. The proceeds of the sale shall be applied first to the payment of the costs of advertising the sale and obtaining the judge's order of transfer, then to the payment of the debt, and the remainder, if any, shall be paid to the debtor, or his order.]

Acts 1917, p. 123.

§ 4215 (ii). **Transfer to secure debt.** [Nothing in this Chapter shall prevent the owner from transferring his registered title as security for debt, or from causing the title to be registered in the name of the creditor by transferring to the creditor as if he were an ordinary vendee of the registered title; and if bond for title or bond to reconvey be given, the same may be noted on the certificate of title on the Title Register and on the owner's certificate, provided the same be attested or acknowledged as if it were a deed.]

Acts 1917, p. 124.

§ 4215 (jj). **Presentation of certificate.** [In all voluntary transactions the owner's certificate of title must be presented, along with the writing or instrument filed for registration; and thereupon, and not otherwise, the clerk shall be authorized to register the transaction.]

Acts 1917, p. 124.

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§ 4215 (kk). **Record other than registration, when not required. Certified copy as evidence. Filing instrument. Record and reference thereto.** [Wherever a transfer, or transfer as security for debt, or mortgage, as to an estate in registered land, is executed in the form prescribed in this Chapter and the same duly registered and noted in the register of titles, and the same contains nothing more than the filling in of the blanks in said forms prescribed, so that the entry of registration on the Title Register, construed in connection with the prescribed form, shows the full transaction, it shall not be necessary to record the transfer, security transfer, or mortgage, otherwise than by the registration in the Title Register; and such registration shall, for all purposes, take the place of recordation as to such instruments so executed; and a certified copy of such registration shall be admissible in evidence on like terms and with like effect as a certified copy of a deed, mortgage, or other similar instrument is admissible under existing laws. In such cases the original instrument of transfer (together with the canceled owner's certificate), or original instrument of transfer as security for debt, or original mortgage, as the case may be, shall be numbered with the registration number of the title to which it relates, and carefully filed away in such manner as to be of easy access, and preserved as a part of the records of the office of the clerk of the superior court. In case of a mortgage so executed the clerk shall, on request, make a certified copy and deliver to the mortgagee, and such certified copy shall stand for all purposes in lieu of the original, and shall be original evidence to the same extent that an original mortgage ordinarily is, in any court. If the instrument of transfer be not in the short form herein prescribed, or if it contains any provisions not provided for in said form, or if it is executed for the purpose of transferring any estate or interest in the registered land in trust, or upon any condition, or upon any peculiar, unusual limitation, the details at variance with or additional to those provided for under the prescribed form need not be entered in full on the Title Register and the owner's certificate, but the clerk shall record such instrument in full on the deed book of the county, in like manner as deeds to unregistered land are recorded, and shall, after the general entry of the transfer on the Title Register and on the owner's certificate, add thereto a notation that the same is "in trust," "upon condition," or "on special terms," as the case may be, followed by the words "See deed book (or mortgage book, as the case may be)..... page....." Like procedure shall be followed in case of a transfer to secure debt or a mortgage not following the form herein prescribed, but in such cases the clerk shall not retain the original instrument, but shall return the same to the creditor after it shall have been registered and recorded.]

Acts 1917, p. 124.

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§ 4215 (11). **Notations on certificates.** [All registered encumbrances, rights, or adverse claims affecting the estate represented thereby shall continue to be noted upon every outstanding certificate of title and owner's certificate, until the same shall have been released or discharged, unless the same shall relate to only a particular portion of the property, when the same shall be noted only upon such certificates and duplicate certificates as relate to that portion of the property.]

Acts 1917, p. 125.

§ 4215 (mm). **Notice by registry.** [Every voluntary or involuntary transaction, which, if recorded, filed, or entered in any clerk's office, would affect unregistered land, shall, if duly registered on the Title Register, and not otherwise, be notice to all persons from the time of such registration, and operate, in accordance with law and the provisions of this Chapter upon such registered land.]

Acts 1917, p. 126.

§ 4215 (nn). **Involuntary transactions.** [Except as herein otherwise provided, in cases of involuntary transactions no transfer of the title shall be registered except upon an order granted by the judge of the court, in the form substantially as that hereinafter prescribed.]

Acts 1917, p. 126.

§ 4215 (oo). **Registered land as personal estate of decedent.** [Lands, and any estate or interest therein registered under this Chapter, shall, upon the death of the owner, testate or intestate, go to his personal representative in like manner as personal estate, and shall be subject to the same rules of administration as personalty, except as otherwise provided in this Chapter, and except that nothing herein contained shall alter or affect the course of ultimate descent under the statute of descents and distributions and the rights of dower, when duly registered, nor shall alter or affect the order in which real and personal assets respectively are now applicable in and towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of debts and legacies.]

Acts 1917, p. 126.

§ 4215 (pp). **Personal representative as trustee. Heirs.** [Subject to the powers, rights, and duties of administration, the personal representative of such deceased owner shall hold such real estate as trustee for the persons by law beneficially entitled thereto, but, unless otherwise entitled by law to commissions, shall be entitled to no commissions thereon, except in cases of necessary sales in due course of administration. And the heirs

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at law or beneficiaries aforesaid shall have the same power of requiring a transfer of such estate as if it were personal estate.]

Acts 1917, p. 126.

§ 4215 (qq). **Letters of administration, etc. Cancellation, and new certificate.** [Upon the grant of letters of administration or executorship by the court of ordinary and upon presentation of a certified copy of the same to the clerk of the superior court and the presentation of the owner's certificate, the clerk shall make a special entry on the certificate of title on the Title Register, showing the presentation of the letters of administration or executorship, the name of the representative, the court and county of his appointment, and the date of the letters and of the transfer of the title to the representative. The clerk shall thereupon cancel the certificate of title and the owner's certificate outstanding in the name of the decedent, and issue to the administrator or the executor, as the case may be, a new owner's certificate. In the event the decedent was the owner of only a fractional undivided interest in the title and the outstanding certificate stood in the name of the decedent and others, or where from any other cause the decedent was not the sole owner of the certificate, the outstanding certificates shall nevertheless be canceled, and a new certificate registered and new owner's certificate issued with the name of the personal representative substituted for the name of the decedent.]

Acts 1917, p. 127.

§ 4215 (rr). **Heirs' title, registry of; procedure on application, publication, transfer of registered title, cancellation and new certificates.** [In case the owner of registered land die intestate, and there is no administration upon the estate within twelve months from the date of his death, or in the event administration terminates without the land being disposed of, the heirs at law of such intestate, or any one or more of the persons who claim to be heirs at law of such intestate, may petition the superior court of the county to have their title by descent declared as to such registered land. In such application there shall be set forth the names of all persons who are alleged to be the heirs at law; and if all are not joined, process or notice shall be served, as in cases in equity, upon all not so joined. The petition shall be verified by the affidavit of one of the petitioners, shall set forth in detail the name and address, as last known, of the decedent, a statement as to whether he was married or single, or a widower; if married more than once, the names of all of his wives; the names of all children and descendants of children, if any, showing in detail whether the parents of such children are living or dead, and showing in detail how and wherein the persons who are alleged to be the heirs at law are in fact the heirs at law of such decedent under the rules of inheritance in this State. It shall also give the date of the death of the

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decedent and set forth that he died leaving no will, and that, in the judgment of the applicant, there is no need for administration upon the estate. Upon such application being filed the judge shall thereupon grant an order setting the application down to be heard at the court-house in the county where the land lies, on some day not less than thirty days from the date of the application, and calling on all persons to show cause before the court on that day why the persons named as heirs at law in the application should not be so declared to be by the judgment and decree of the court. A copy of the application and the order of the court thereon shall be published in the newspaper in which the sheriff's sales of the county are advertised in like manner as sheriff's sales are advertised. Upon the day named, unless the matter be continued by order or orders of the judge to some future time, the court shall proceed to hear and determine the question, together with all objections, if any, which may be filed, and to adjudge and decree that the alleged decedent is dead and that there is no administration on his estate, and that he left no will, and who are his heirs at law; unless it appears that the alleged decedent is not dead, or that there is administration upon the estate, or that an application for administration is pending, or that the decedent left a will, in either of which events the petition shall be dismissed. Upon granting an order of heirship the court shall thereupon order a transfer of the registered title from the decedent to the heirs at law to be registered; and upon production of the owner's certificate of the decedent, and the judge's order for a transfer, the clerk shall register the transfer and cancel the certificate registered in the name of the decedent and the owner's certificate, and issue a new owner's certificate in the name of the persons declared to be the heirs at law. In such an application, if the alleged heirs at law be of full age and under no disabilities, and the same shall so appear to the court, and it shall further appear that they have voluntarily partitioned the land in kind among themselves, the court may, in connection with the order of transfer, direct that the certificate standing in the name of the decedent be canceled and that new certificates shall be registered and issued to each of the heirs for the particular parcel of land coming to each under the voluntary partition set forth in the application. If the decedent shall have left a widow, the application shall disclose whether the widow has elected to take dower or to become an heir of the estate, and she shall be a party to the proceedings, and the court shall specifically provide what interest or estate she shall take under the decree of heirship, and, except where in the decree the land is partitioned into separate tracts, the court shall, in the decree of heirship and in the order of transfer, specifically set forth (except in the case of sole heir), what undivided interest each heir shall take. In case the decedent be a female, the procedure shall be similar, except in so far as the difference between

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the rights of the husband and wife upon the death of his spouse shall make changes necessary. Where the wife claims to be entitled to take possession of the estate without administration, under the provisions of subsection 1 of section 3931, the procedure shall be substantially in the same manner.]

Acts 1917, p. 127.

§ 4215 (ss). **Administration after registry to heirs.** [Wherever a transfer of registered land shall have been made to heirs at law, or to the widow claiming to be the sole heir, as stated in the preceding section, if at any time thereafter a personal representative is appointed upon the estate of the decedent he shall not be entitled to have such registered land transferred to him for purposes of administration; but if it appears that the heirs have thereby appropriated to their use and ownership property which should have been appropriated to the purposes of administration, the personal representative of the decedent shall have a right of action against the heirs for the value of the property so appropriated, the judgment in such action to be moulded according to the exigencies of the particular case, in accordance with the principles of equity.]

Acts 1917, p. 129.

§ 4215 (tt). **Administrator's transfer to heirs.** [Wherever an administrator shall have been appointed and shall have caused registered land to be transferred into his name, and he stands ready to be discharged, and it is not necessary to sell such registered land for the purposes of administration and it should properly go to the heirs at law of the decedent, he may institute a proceeding substantially similar to that prescribed in section forty-five of this Chapter, for the ascertainment of the heirs at law and for an order directing the transfer of such estate from him to such heirs at law when so ascertained. In case any other trustee shall hold title, where the beneficiaries of the trust are not definitely and particularly disclosed, and it becomes appropriate that they should be definitely ascertained, such trustee may in like manner petition the court, upon showing that the trust has become executed, for a decree settling and ascertaining who the beneficiaries are, and directing a transfer to such beneficiaries.]

Acts 1917, p. 130.

§ 4215 (uu). **Husband and wife.** [In cases of transfer of registered land, or any interest therein, from wife to husband, or vice versa, the transfer shall not be entered nor made until the same shall have been approved by the judge of the superior court, and the fact of such approval shall be entered upon the Register of Titles.]

Acts 1917, p. 130.

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§ 4215 (vv). **Transfer by clerk, how made.** [Wherever, as the result of a proceeding in any court of law or in equity, it is adjudged that a transfer of registered land should be made, such transfer may be made by the clerk upon the production of a certified copy of such decree showing in what book and page of the minutes of the court that rendered it the decree is recorded, and an order of the judge of the superior court of the county in which the land lies, directing such transfer to be made; and the certificate of title on the Register of Titles, and the owner's certificate, shall be canceled and new certificates shall be registered and issued accordingly. Production of the certified copy of the decree shall not be required when it is rendered in the same court as that in which the title is registered, but the clerk shall act upon the judge's order of transfer and the inspection of his own minute book.]

Acts 1917, p. 130.

§ 4215 (ww). **Involuntary transfer.** [Wherever in any other case it is desired to have an involuntary transfer entered of record, application therefor shall be made to the judge of the court. The judge may hear the facts or, if he deems best, he may refer the application to an examiner of titles to make up and report the facts. He shall see to it that all parties at interest are given reasonable notice before any order of transfer is made. Wherever, in his judgment, the interests of justice so require, he shall, before granting such order, cause notice of the application to be published in the newspaper in which the sheriff's sales of the county are advertised for not less than four insertions in separate weeks. Before granting such order directing the transfer, he shall fully satisfy himself that all parties who have or may have an interest in the matter of the transfer have been notified, and, in the case of minors or other persons under disability, that guardians ad litem have been appointed to represent their interests, and that there is no valid reason why the order directing involuntary transfer should not be made, and thereupon he shall enter a decree or judgment upon the minutes of the court, reciting the facts and that an order of transfer has been issued, and shall issue the order of transfer in substantially the form and manner herein prescribed.]

Acts 1917, p. 131.

§ 4215 (xx). **Notation of encumbrance.** [Any writing or instrument for the purpose of encumbering or otherwise dealing with equitable interests in registered land, or tending to show a claim of lien or encumbrance thereon or right therein, may be noted on the certificate of title in the Title Register with such effect as it may be entitled to have.]

Acts 1917, p. 131.

§ 4215 (yy). **Production of owner's certificate compelled. Transfer and cancellation.** [Wherever it is sought to have an involuntary transfer

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registered under the provisions of this Chapter, and the owner's certificate is not produced so as to be attached to the order directing a transfer, the court shall have the power to issue subpoena duces tecum or any other process designed to compel the production of the owner's certificate, including attachment for contempt; and if after the process issues the owner's certificate shall not have been produced, or it appears to the court that there is no practical means of compelling its production, the court may nevertheless grant the order of transfer, but shall cause the clerk to enter a cancellation of the certificate of title on the Title Register, and to give notice once a week for four weeks in the newspaper in which the sheriff's sales of the county are advertised that such certificate has been canceled, the cost of making such advertisement to be deposited with the clerk before the judge grants the order of transfer without the production of the certificate.]

Acts 1917, p. 131.

§ 4215 (zz). **Change of name.** [Any person having any interest in registered land, whose name shall have been changed by marriage or other cause, may, by petition to the judge of the court, and upon proof of the facts, obtain an order directed to the clerk to note the change of name upon the Title Register, and upon the owner's certificate upon the same being produced.]

Acts 1917, p. 132.

§ 4215 (aaa). **Lien and lis pendens to be noted.** [No judgment, levy, or other lien (except lien for taxes, as to which special provision is herein made) shall be effective against registered land, so as to affect any person taking a transfer thereof or obtaining any right or interest therein, unless and until a notation of such judgment or levy or lien be made upon the Title Register. The pendency of any suit affecting the title to registered land, or any interest therein, shall not be held to be notice to any person other than the actual parties to such suit, unless a notation of the pendency of such suit be made upon the Title Register.]

Acts 1917, p. 132.

§ 4215 (bbb). **Transfers to defeat creditors; attack and procedure.** [Nothing herein shall prevent any transfer or other dealing with registered land from being attacked in a court of law or equity as having been made for the purpose of hindering, delaying, or defrauding creditors; provided, that the court having jurisdiction of the case, upon the trial thereof, shall find that the person taking the transfer, or the apparent beneficiary of such dealing, took the benefit of the same with knowledge of the fact that the intention of the transaction was to hinder, delay, or defraud creditors; and provided, further, that none of the rights of innocent parties shall be affected thereby. If a court having jurisdiction of

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the case, upon such proceeding, shall find that any transfer or other dealing with registered land shall have been made for the purpose of hindering, delaying, or defrauding creditors and that the rights of no innocent parties will be prejudiced by the court's judgment or decree, it shall be within the power of said court to pass such judgment or decree as will avoid such transfer or the effect of such other transaction as may have been made to hinder, delay, or defraud creditors; and upon the decree or judgment of such court the judge of the superior court of the county where the land lies, upon application as hereinbefore provided, shall have the authority and power to direct such cancellations and transfers to be entered upon the Title Register and upon the owner's certificate as shall be necessary to carry the same into effect.]

Acts 1917, p. 132.

§ 4215 (ccc). **Transfer in trust, on condition or limitation.** [Whenever a writing or record is filed for the purpose of transferring registered land in trust, or upon any condition or unusual limitation expressed therein, or where power is given to sell, encumber, or deal with the land in any manner, no subsequent transfer or voluntary transaction purporting to be exercised under the powers given in such writing or instrument or record shall be registered on the Title Register or on the owner's certificate, except upon application to the court and order of direction from the judge to the clerk as to how the same shall be entered.]

Acts 1917, p. 133.

§ 4215 (ddd). **Taxes or assessments. Duty of tax officer. Penalties.** [It shall be the duty of every officer in this State charged with the collection of taxes or assessments which shall be a charge upon any registered land or any interest therein, if such taxes or assessments are not paid when due, on or after the expiry of the 31st day of December of the year in which such tax or assessment shall become due, to cause to be entered upon the certificate of title on the Title Register a notation of the fact that such tax or assessment on such registered land or interest therein has not been paid, and the amount thereof. Until and unless such notation is made, such delinquent tax or assessment shall not affect any transfer or other dealing with such registered land, but the tax officer failing to perform such duty, and his surety shall be liable for the payment of said taxes, and assessments, with all lawful penalties and interest thereon if any loss is occasioned to the political body, be it State, county, municipality, or other division, by which such loss is sustained.]

Acts 1917, p. 133.

§ 4215 (eee). **Duplicate of lost certificate.** [Whenever an owner's certificate of title is lost or destroyed, the owner, or his personal representative, may petition the court for the issuance of a duplicate. Notice

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of such petition shall be published once a week for four successive weeks in the newspaper in which the sheriff's sales of the county are published; and upon satisfactory proof having been exhibited before it that said certificate has been lost or destroyed, the court may direct the issuance of a duplicate certificate, which shall be appropriately designed and take the place of the original owner's certificate: Provided, that the court may in any case order additional notice to be given, either by publication or otherwise, before directing the issuance of a duplicate certificate; and provided, further, that in case the application is made by personal representative of a deceased person, claiming that the certificate was lost or destroyed while in the possession of the decedent, the notice of the petition shall be published once a week for eight successive weeks, instead of four, as required in other cases.]

Acts 1917, p. 134.

§ 4215 (fff). **Clerk's duty. Registration, entries, and notations, when conclusive. Direction by court to clerk.** [The clerk of the superior court is charged with the primary duty of determining whether any instrument, writing or record, or other matter is in proper shape for registration, and with the duty of correctly and legally making the registration, including all formal incidents thereto, and shall be liable to any injured person for any failure of duty in this respect. All registrations of title and all entries and notations made by him upon the Title Register, of transfers or of the cancellation or discharge of liens or encumbrances, shall be prima facie conclusive; and unless a caveat be filed, as provided for in this Chapter, seeking to set aside, modify, or otherwise affect such entry, notation, or registration, within twelve months from the date of the making of the same upon the Title Register, the same shall become absolutely conclusive upon all persons; this to be considered and construed as a statute of limitations against the questioning of the correctness of the clerk's action, and is to be without exception on account of disabilities, but shall not operate as a limitation in favor of the clerk as to any action against him for wrong-doing or neglect of duty. In the event application is made to a clerk to have any transfer or other transaction registered or noted, and he shall be in doubt as to whether the same should be registered, entered, or noted, or shall be in doubt in regard to any detail thereof, either the clerk or any party at interest may petition the judge of the court for direction; and such judge, after it shall have appeared that the parties at interest have had reasonable notice, may proceed to hear the matter and to give directions and instructions to the clerk, whose duty it shall be to follow the directions and instructions of the court.

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In all matters required of the clerk under this Chapter, he shall be subject to the direction and orders of the court.]

Acts 1917, p. 134.

§ 4215 (ggg). **Caveat to entry, etc. Judgment thereon.** [If any person at interest shall object to any entry, registration, or notation made by the clerk upon the Title Register, he may, unless such entry, registration, or notation shall have become conclusive by lapse of time under the provisions of this Chapter, file with the clerk of the court a caveat, setting forth the entry, notation, or registration to which he objects; setting forth what interest he has in the subject-matter, and setting forth the ground of his objection, and praying for such relief as he desires and deems appropriate in the premises. Thereupon the clerk shall note upon the Register of Titles the fact that caveat has been filed, and by whom, and to what entry, notation, or act of registration it applies. Thereupon the matter shall be presented to the judge, who shall order all persons at interest to show cause on a day named why the relief prayed for in the caveat should not be granted; and upon proof being made that due notice has been given to all parties at interest, the judge shall proceed to hear the matter and shall render a judgment of the court, giving direction to the matter, and may thereupon require such entry, registration, or notation to be canceled or modified, and may require the outstanding certificate of title and owner's certificate to be modified accordingly. To that end the court may require the outstanding owner's certificate of title to be brought into court by subpoena duces tecum, or other process, including attachment for contempt, and if the court finds that production of the certificate can not be compelled, then he shall provide for publication of notice of the court's action thereon for a period of time not less than once a week for four weeks in the paper in which the sheriff's sales of the county are advertised, the expense of making the publication to be provided for in such manner as the court shall order.]

Acts 1917, p. 135.

§ 4215 (hhh). **Procedure to obtain notation.** [The method of causing notations of judgments, liens, encumbrances, or special rights of any kind, other than voluntary transactions claimed by any person against registered land, shall be as follows: The person desiring the notation to be made shall, by himself, his agent or attorney, file, upon a form substantially in compliance with that herein provided for, a request for the notation to be made, giving the particulars; and in case the lien or special rights relate to any other matter of record or court proceeding, he shall state the book and page where recorded, and, if it relates to any special right, shall succinctly give the details of such right so claimed. In case the notation is for the purpose of protecting the lien of a judgment, the

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persons making the application for the notation shall produce and exhibit to the clerk the execution or a certified copy of the judgment, except in cases where the judgment is rendered in the superior court of the same county where the registration is made, in which event production of the execution or certified copy of the judgment shall not be required, but the clerk may act upon inspection of the original judgment on the minutes of his own court.]

Acts 1917, p. 136.

§ 4215 (iii). **Cancellations, entry of.** [Voluntary cancellations may be made of any mortgage, certificate of indebtedness, or any lien, equity, encumbrance, lis pendens, or other similar matter relating to registered land or any interest therein, and may be entered by the clerk upon the Title Register and the owner's certificate. The entry, notation, or registry of such cancellation may be made upon the written authority of the person for whose benefit the original registration, notation, or entry was made, or his personal representative, or lawful assignee, in a form substantially in compliance with that herein prescribed, attested by any officer authorized to attest deeds; or upon order of the judge. In case of a creditor's certificate the same shall also be surrendered and canceled. Notations of delinquent taxes or assessments may be canceled upon the production of a certificate of the proper tax officer showing that such taxes or assessments have been paid.]

Acts 1917, p. 136.

§ 4215 (jjj). **Adverse claims, land free from except as stated. Limitation of action to set aside.** [Every registered owner of any estate or interest in land brought under this Chapter shall, except in cases of fraud or forgery to which he is a party, or to which he is a privy without valuable consideration paid in good faith, hold the land free from any and all adverse claims, rights, or encumbrances not noted on the certificate of title in the Title Register, except:

First. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this State can not require to appear of record under registry laws.

Second. Taxes and levies assessed thereon for the current calendar year.

Third. Any lease for a term not exceeding three years, under which the land is actually occupied.

Fourth. Highways in public use, and railroads in actual operation.

No proceedings to attack or to set aside any transaction for such fraud or such forgery as is referred to in this section shall be brought or be entertained by any court unless the same shall have been brought within seven years from the date of the transaction or of the registration to

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which the same relates. Nothing herein shall conflict with the provisions of this Chapter allowing attack for good cause to be made upon a registration made by the clerk at any time within twelve months from the date of such registration.]

Acts 1917, p. 137.

§ 4215 (kkk). **Agreement running with land.** [The obtaining of a decree of registration and the entry of a certificate of title shall be construed as an agreement running with the land, and, except as hereinafter provided, the same shall remain registered land subject to the provisions of this Chapter and all amendments thereof.]

Acts 1917, p. 138.

§ 4215 (lll). **Freedom from further registration. Liens, etc., not affected.** [If the person who is the registered owner of the fee-simple title to the land shall at any time so desire, he may cause a transfer of the title to be registered to himself, "his heirs and assigns, free from further registration." Thereupon the land and the title thereto shall be free from the necessity of subsequent registration, and shall as to subsequent transactions be exempt from the provisions of this Chapter, so far as the interest of the person thus freeing it from registration and subsequent holders under him are concerned; but as to such interest the certificate of title and owner's certificate registered and issued on the last transfer shall stand as a conclusive source of subsequent title to the same extent as if it were a grant from the State. However, if the interest thus freed is, according to the Title Register, subject to liens, exceptions, encumbrances, trusts or limitations of any kind, such liens, exceptions, encumbrances, trusts or limitations shall not be affected, but shall be noted on the owner's certificate as issued on the last transfer, and shall be effective against the same as long as they shall subsist. If the fee simple be registered undividedly in the name of more than one person, as tenants in common or other like relationship of joint or common interest, it shall not be freed from registration except upon the unanimous action of the owners of the entire fee.]

Acts 1917, p. 138.

§ 4215 (mmm). **No prescriptive title.** [No title to nor right nor interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.]

Acts 1917, p. 138.

§ 4215 (nnn). **Court in session at all times.** [For the purposes of this Chapter the superior courts of the various counties of this State shall be considered as being open and in session at all times, except on Sundays; and every official act of the judge on any matter shall be considered as

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having been rendered in open court; and no recess or adjournment of the court taken generally or for any other particular purpose shall be considered as having recessed or adjourned the court so far as the purposes of this Chapter are concerned; and any limitations existing, either under general law or special acts, as to length of time in which the various superior courts of this State may sit in the various counties, shall not be construed as affecting the provisions of this Chapter.]

Acts 1917, p. 139.

§ 4215 (ooo). **Inspection of records by examiner.** [Every clerk of the superior court, every ordinary, and every other officer in this State having charge of public records shall allow each and every examiner appointed by any court in this State, for the purposes of this Chapter, free inspection of all the public records relating to his office and in any wise appertaining to any matter under the investigation of such examiner.]

Acts 1917, p. 139.

§ 4215 (ppp). **Disqualified clerk.** [In case any clerk is disqualified by reason of relationship or interest, or from any other cause, or in case of the death or other disability of the clerk of the superior court to act in any matter arising under this Chapter, the duties required of such clerk may be performed either by the ordinary of the county or by a special clerk appointed by the judge for that purpose, the entry of appointment of such special clerk and of the purpose for which he is appointed being duly entered and recorded upon the minutes of the court.]

Acts 1917, p. 139.

§ 4215 (qqq). **Rules and forms by judges to be uniform.** [The judges of the superior courts in convention may from time to time make general rules and forms for procedure relating to the subjects in this Chapter dealt with, and may modify the forms herein prescribed, but such rules and forms shall be uniform throughout the State, and shall be subject to the provisions of this Chapter and the general laws of this State.]

Acts 1917, p. 139.

§ 4215 (rrr). **Stenographer.** [In any case, by consent of the parties or upon order of the judge, the examiner may procure the services of a stenographer to report the testimony taken before him; and the compensation of such stenographer, unless agreed on by the parties, shall be fixed by the judge and taxed as costs.]

Acts 1917, p. 139.

§ 4215 (sss). **Notice additional, manner of.** [Wherever notice is required by this Chapter and no provision as to how notice shall be given is made, or wherever, in the discretion of the judge, additional notice to

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that provided for in this Chapter should be given to any particular person or persons, or to the public generally, the judge may order such notice to be given, and provide the manner in which it shall be given.]

Acts 1917, p. 140.

§ 4215 (ttt). **Registration necessary, to affect registered land.** [Except as otherwise specially provided by this Chapter, registered land and ownership therein shall be subject to the same rights, burdens, and incidents as unregistered land, and may be dealt with by the owner, and shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered. But registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument, or record to be registered is duly registered on the Title Register. Subject to the provisions of section 4215 (jjj), no voluntary or involuntary transaction shall affect the title to registered land until registered or noted on the Title Register, in accordance with the provisions of this Chapter.]

Acts 1917, p. 140.

§ 4215 (uuu). **Assurance fund.** [Upon the original registration of any land under this Chapter there shall be paid to the clerk one-tenth of one per centum of the value of such land, to be determined by the court, as an assurance fund, which shall be subject to the trusts and conditions hereinafter declared for the uses and purposes of this Chapter.]

Acts 1917, p. 140.

§ 4215 (vvv). **State treasury custodian.** [All moneys received by the clerk under the preceding section shall be kept in a separate account and be paid promptly into the State treasury upon the special trust and condition that the same shall be set aside by the treasurer in trust as a separate fund for the uses and purposes of this Chapter, to be known as the "Land Registration Assurance Fund," which said fund is hereby appropriated to the uses and purposes set forth in this Chapter.]

Acts 1917, p. 140.

§ 4215 (www). **Investment of the fund. Income, how applied.** [Said moneys, in so far as the same may not be required to satisfy any judgment certified against the assurance fund under section 4215 (zzz) shall be invested by the treasurer of the State in State bonds, or validated county or municipal bonds, in trust for the uses and purposes set forth in this Chapter, until said fund amounts to the sum of five hundred thousand dollars; but the income, or so much thereof as may be required therefor, may be applied towards the payment of the expenses of the administration of this Chapter and the satisfaction of any such judgment. Whenever and so long as the face value of the bonds purchased as aforesaid

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equals said sum of five hundred thousand dollars, other moneys thereafter coming into said fund, together with any income not required for the purposes aforesaid, shall be transferred from the land registration assurance fund to the general treasury.]

Acts 1917, p. 141.

§ 4215 (~~xxx~~). **Action against assurance fund. Defense. Measure of damages. Persons under disability.** [Any person entitled to notice and who had no actual notice of any registration under this Chapter by which he may be deprived of any estate or interest in land, and who is without remedy hereunder, may, within two years next after the time at which the right to bring such action shall have first accrued to him, or to some person through whom he claims, bring an action of assumpsit against the treasurer of the State, in the superior court in the county where such land is located, for the recovery, out of the assurance fund, of any damages to which he may be entitled by reason of any such deprivation. The treasurer shall be served by second original copy of proceedings so filed, which service shall be sufficient. The assurance fund shall be defended in such action and in any appeal by the attorney-general for the State. The measure of damages in such action shall be the value of the property at the time the right to bring such action first accrued, and any judgment rendered therefor shall be paid as hereinafter provided. If any person entitled to bring such action be under the disability of infancy, insanity, imprisonment, or absence from the State in the service of the State or of the United States, at the time the right to bring such action first accrued, the same may be brought by him or his privies within two years after the removal of such disability; but provided, nevertheless, that all persons non-resident of the State, all persons who are described in the proceedings as being unknown, or of unknown address, or as to whom it appears from the record that they could not be found so as to be served, shall be considered as having had actual notice where notice has been published in accordance with the provisions of this Chapter.]

Acts 1917, p. 141.

§ 4215 (~~yyy~~). **Parties defendant.** [If such action be brought to recover for loss or damage arising only through the legal operation of this Chapter, then the treasurer of the State shall be the sole defendant. But if such action be brought to recover for loss or damage arising on account of any registration made or procured through fraud, neglect, or wrongful act of any person not exercising judicial function, then both the treasurer of the State and such person or persons shall be made parties defendant.]

Acts 1917, p. 142.

§ 4215 (~~zzz~~). **Payment of execution. Liability of other persons.** [If judgment be rendered for the plaintiff in any such action, execution shall

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issue against the defendants, if any, other than the treasurer of the State. And if such execution be returned unsatisfied in whole or in part, or if there be no such defendants, then the clerk of the court in which the judgment was rendered shall certify to the treasurer the amount due on account thereof, and the same shall then be paid by said treasurer out of the assurance fund under the special appropriation hereby made of said fund for that purpose. Any person other than the treasurer of the State, against whom any such judgment may have been rendered, shall remain liable therefor, or for so much thereof as may be paid out of the assurance fund; and said treasurer may bring suit at any time to enforce the lien of such judgment against such person or his estate for the recovery of the amount, with interest, paid out of the assurance fund as aforesaid.]

Acts 1917, p. 142.

§ 4215 (aaaa). **Nonliability of fund.** [The assurance fund shall not, under any circumstances, be liable for any loss, damage, or deprivation occasioned by a breach of trust, whether express, implied, or constructive, on the part of the registered owner of any estate or interest in land.]

Acts 1917, p. 142.

§ 4215 (bbbb). **Insufficiency of fund.** [If at any time the assurance fund be insufficient to satisfy any judgment certified against it as aforesaid, the unpaid amount shall bear interest and be paid in its order out of any moneys thereafter coming into said fund.]

Acts 1917, p. 143.

§ 4215 (cccc). **Review on writ of error.** [All judgments and decrees of the superior court or the judge thereof rendered under the provisions of this Chapter shall be subject to review by the Supreme Court upon writ of error, and the procedure to obtain such review shall be by what is known as fast writ of error, and such as obtains in injunction and criminal cases.]

Acts 1917, p. 143.

§ 4215 (dddd). **Deputy clerk and sheriff.** [The duties required of the clerk and sheriff hereunder may be performed through their lawful deputies, the clerk or sheriff as the case may be, however, being responsible for the act of such deputy.]

Acts 1917, p. 143.

§ 4215 (eeee). **Limitations of actions.** [Neither the limitations provided by this Chapter within which proceedings hereunder may be brought, nor the provisions setting times whereupon matters and things shall become conclusive, shall prevent any injured party from having an action at law against any person or officer through whose fraud or negligence he may have suffered any loss or damage arising out of any acts

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of omission or of commission of such person or officer in connection with the matters and things arising from the provisions of this Chapter, but all such actions shall be governed by the statutes of limitation which would otherwise relate to the transaction.]

Acts 1917, p. 143.

§ 4215 (ffff). **Punishment as felony for acts of fraud, forgery, theft, etc. Official misconduct.** [Any person who shall fraudulently obtain or attempt to obtain a decree of registration of title to any land or interest therein, or who shall knowingly offer in evidence any forged or fraudulent document in the course of any proceedings in regard to registered lands or any interest therein, or who shall make or utter any forged instrument of transfer or instrument of mortgage, or any other paper, writing, or document used in connection with any of the proceedings required for the registration of lands, or the notation of entries upon the Register of Titles, or who shall steal or fraudulently secrete any owner's certificate, creditor's certificate, or other certificate of title provided for under this Chapter, or who shall fraudulently alter, change, or mutilate any writing, instrument, document or record, or registration or register provided for under this Chapter, or who shall make any false oath or affidavit in respect to any matter or thing provided for in this Chapter, or who shall make or knowingly use any counterfeit of any certificate provided for by this Chapter, shall be guilty of a felony and be punished by imprisonment in the penitentiary for not less than one nor more than ten years. Any clerk, deputy clerk, special clerk, or other person performing the duties of clerk who shall fraudulently enter a decree of registration without authority of the court, or who shall fraudulently register any title, or who shall fraudulently make any notation or entry upon the Title Register, or shall fraudulently issue any certificate of title, or creditor's certificate or other instrument provided for by this Chapter, or who shall knowingly, intentionally, and fraudulently do any act of omission or commission under color of his office in relation to the matters provided for by this Chapter, shall be guilty of a felony and be punished by imprisonment in the penitentiary for not less than one nor more than ten years, and shall, upon his conviction, be removed from office and thereafter forever disqualified from holding any public office. Any examiner of title who shall knowingly and fraudulently make any false report to the court as to any matter relating to any title which it is sought to register under the provisions of this Chapter, or as to any matter affecting the same, or as to any other matter referred to him under the provisions of this Chapter, or who shall fraudulently conspire or confederate with any other person or persons to use the provisions of this Chapter to the defrauding of any other person or persons, firm or corporation, or who

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shall be guilty of any willful malpractice in his office, shall be guilty of a felony and be punishable by imprisonment in the penitentiary for not less than one nor more than ten years. Any sheriff or deputy sheriff or other person performing the duties of the office of sheriff, who shall knowingly and fraudulently make any false entry or return in connection with any matter arising under the provisions of this Chapter, or who shall fraudulently conspire with any person or persons to defraud any other person or persons through the provisions of this Chapter, shall be guilty of a felony and be punished by imprisonment in the penitentiary for not less than one nor more than ten years, and on conviction shall be removed from office and thereafter forever disqualified from holding any public office in this State. The felonies provided for in this Chapter may, in the matter of punishment, be reduced to misdemeanors in the manner prescribed in section 1062 of the Penal Code.]

Acts 1917, p. 143.

§ 4215 (gggg). **Form of petition to register land.** [The following is prescribed as the form of petition to be used when application is made for the original register of lands:

Original Petition for Registration of Lands.

Georgia,.....County.

To the Superior Court of said County:

The petition of.....
shows:

The petitioner applies to have the land hereinafter described brought under the provisions of the Land Registration Act, and his title thereto confirmed and registered as provided therein, and under oath shows the following facts:

- (1) Full name of each applicant.....
- (2) Residence of each applicant.....
- (3) Post-office address of each applicant.....
- (4) The name and address of applicant's agent or attorney upon whom process or notices may be served (not required unless applicant is a non-resident)

- (5) Full description of the lands (giving also land district and lot numbers where the land lies in that portion of the State where the lands

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have been surveyed by districts and numbers; and if more than one parcel is included, describe each parcel separately and distinctly).

.....

 containing.....acres.

(6) What is the value thereof? \$.....

(7) At what value was it last assessed for taxes? \$.....

(8) What interest or estate does the applicant claim therein?.....

.....
 (9) What is the value of the interest or estate claimed by the applicant?

(10) From whom did the applicant acquire the land?

.....
 (11) Does the applicant claim title by prescription?
 (If so, set forth fully the color of title, if any, under which the prescription is claimed, and state the details of the possession by which it is claimed prescription has ripened. If the color of title consists of one or more instruments of record on the public roads of the county, such instruments need not be copied or exhibited to the application otherwise than by giving the name of the grantor and the grantee, the date and nature of the instrument, and a reference to the book and page where recorded.)

(12) Does applicant claim title by a complete chain of title from the State or other original source of title?.....

(13) Is there a true and correct abstract of applicant's title papers attached hereto?.....

(14) Do you know, or have information, of any other deed, writing, document, judgment, decree, mortgage, or instrument of any kind not set forth in the abstract which relates to this land or any part thereof, or which might affect the title thereto or some interest therein? If so, state the same.

(15) Has the land, or any part thereof, ever been set apart as a homestead or exemption or as dower? If so, state particulars.

(16) Who is now in possession of the land?.....

(17) Do you know any one else who claims to be in possession of the land or any part thereof? If so, give name and address:

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(18) Give name and address of each person occupying the land or any part thereof, and state by what right or claim of right such occupancy is held.

(19) Give the name, residence, and address of each and every person, other than the applicants, who claim any interest, adverse or otherwise, vested or otherwise, in the land or any part thereof, stating the nature of the claim, and if any such persons are under disability of any kind, state the nature of the disability:

Name	Residence	Address	Disability (if any)	Nature of Claim
.....
.....
.....
.....
.....

(20) Give the name, residence, and address of the holder of every known lien, whether considered by the applicant to be valid or not:

Name	Residence	Address	Nature of Lien
.....
.....
.....
.....
.....

(21) Give the names and addresses of the owners and occupants of all adjoining lands:

(22) Is the land subject to any easement, except public highways and railroads in actual operation? If so, state fully.

(23) Give age of applicant.....

(24) Is the applicant male or female?....., married or single....., widow or widower?.....

(25) If married, give wife's (or husband's) name, and include her or him in the list of defendants

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the prayers of the foregoing petition should not be granted, and why the court should not proceed to judgment in such cause.

Witness the Honorable....., judge
of said court, this the.....day of.....19....
.....Clerk.]

Acts 1917, p. 150.

§ 4215 (iiii). **Form of advertisement.** [The advertisement to be inserted in the newspaper in which sheriff's sales of the county are advertised for four insertions in separate weeks should be substantially in the following form:

Georgia,.....County.

In the Superior Court of said County.

To whom it may concern, and to (here insert the names of all defendants, if any, who reside beyond the limits of the State, or whose place of residence is unknown):

Take notice that.....
has filed in said court a petition seeking to register the following lands under the provisions of the Land Registration Act, to wit: (Here describe lands). You are warned to show cause to the contrary, if any you have, before said court on the.....day of.....19....

This.....day of.....19....

.....Clerk.]

Acts 1917, p. 150.

§ 4215 (jjjj). **Acknowledgment of service.** [Acknowledgment of service may be made in the following form, provided it be entered on the petition or entitled in the cause and signed in the presence of the judge, the clerk, or the examiner, and attested by such officer:

Due and legal service of the within and foregoing petition for registration is acknowledged. Further service, process, and notice waived, this the.....day of.....19....

In the presence of.....]

Acts 1917, p. 151.

§ 4215 (kkkk). **Return of service and of posting, etc.** [The sheriff's return should be made substantially in the following form, and entered on or attached to the petition:

Georgia,.....County:

I have served copies of the within petition for registration and process upon the following persons at the time and in the manner stated as follows:

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.....

 I have also posted in a conspicuous place on the land described herein and on each separate tract thereof a copy of the notice as required by law. I have furthermore gone upon the land, and the following is the name and post-office address of each and every person above the age of 14 years actually occupying the premises, viz.:

.....

 This the.....day of.....19....
Sheriff.]

Acts 1917, p. 151.

§ 4215 (lIII). **Certificate of mailing.** [The clerk should also enter on the petition a certificate substantially in the following form:

I certify that on the.....day of.....19..., I mailed to each of the following persons a copy of the within petition and process to his post-office address as disclosed by the record, viz.:

.....

 and that advertisement has been published in accordance with law, a copy of said advertisement being hereto attached.

This.....day of.....19....
Clerk.]

Acts 1917, p. 152.

§ 4215 (mmmm). **Form of examiner's appointment.** [Substantially, the following form should be used in appointing examiners:

Mr., a competent attorney at law, of good standing in his profession and of at least three years' experience, is hereby appointed a master or auditor in and for the..... Judicial Circuit, to discharge the duties of examiner as provided in the Land Registration Act. This appointment is..... (either general or for a particular case, as the case may be).

This.....day of.....19....

 Judge Superior Court.]

Acts 1917, p. 153.

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§ 4215 (nnnn). **Oath of examiner.** [The examiner is required to take the following oath to be filed along with the order of his appointment in the office of the clerk of the superior court of his residence:

I,, do swear that I will faithfully, well and truly perform the duties of examiner under the Land Registration Act, according to law to the best of my skill and ability.

Sworn to and subscribed before me, this.....day of.....19....

Acts 1917, p. 153.

§ 4215 (oooo). **Form of reference to examiner.** [Upon the clerk's notifying the judge that a petition has been filed, he shall promptly refer it to an examiner in substantially the following form:

In the Superior Court of.....County, Ga.:
In re.....
Application to register

Land.

Ordered that this matter be and is hereby referred to....., as examiner for proceedings in conformity with the Land Registration Act.

This.....19....

Judge.]

Acts 1917, p. 153.

§ 4215 (pppp). **Form of preliminary report of examiner. Schedules.** [The following is suggested as the general form of the preliminary report of an examiner:

In the Superior Court of.....County, Ga.:
In re.....
Application to register

Land.

The undersigned, as examiner, makes the following preliminary report:

I have examined all records as required by the Land Registration Act.

I attach an abstract of the title (Schedule A) as shown on the public records and so far as obtainable from other trustworthy sources.

The names and addresses of all persons, so far as I have been able to ascertain, who have any interest in the land, are set out in Schedule B hereto, showing their several apparent or possible interests and indicating

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upon whom and in what manner service should be made. A like disclosure of all adjoining landowners is set out in Schedule C hereto.

I find the following to be a history of the possession.....

.....
Special attention is called to the following matters:

.....
This.....19....

.....
Examiner.

SCHEDULE A.

Examiner's Full Abstract.

SCHEDULE B.

Names and addresses of all persons having apparent or possible interests in the land, other than applicants, and indicating upon whom and in what manner further service, if any, should be made.....

SCHEDULE C.

Names and addresses of all adjoining owners:.....

.....]
Acts 1917, p. 154.

§ 4215 (qqqq). **Form of final report of examiner.** [The following is suggested as the general form of the examiner's final report:

In the Superior Court of.....County, Ga.:

In re.....

Application to register

.....
Land.

The undersigned, as examiner, makes this his final report:

The preliminary report filed by the undersigned is made a part hereof, and is correct, except as herein otherwise stated. The following proceedings have occurred before the examiner, and accompanying herewith is a brief (or a stenographic) report of the evidence taken on the hearing:

.....
In Exhibit....., hereto, is a report of the matters ascertained by the independent examination of the examiner.

My conclusions of fact are set forth in Exhibit.....hereto annexed.

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My conclusions of law are set forth in Exhibit....., hereto annexed.

I find the state of the title to be as follows:

I find that there are liens and encumbrances on the land as follows:

This.....19....

Examiner.]

Acts 1917, p. 155.

§ 4215 (rrrr). **Form of decree of title.** [Decrees of title should be rendered in accordance with the following form:

State of Georgia.....County:

In the Superior Court of said County:

In re.....

Application to register

Land.

The above entitled cause coming on to be heard and it appearing to the court that process has been served and notice given and publication made, all in full compliance with the Land Registration Act, and that all the requirements of said Act have been complied with, it is decreed, ordered, and adjudged that the title to the lands involved, to wit: (here describe lands) is held and owned as follows:

The fee simple belongs to.....

 subject to the following limitations and conditions:.....

It is further ordered and decreed that said lands be and are hereby brought under the operation and provisions of the Land Registration Act, and the title of the said.....
 in and to the estate herein set forth above is confirmed and ordered registered: subject, however, to the following liens and encumbrances, viz.:

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and subject also to.....

Let this decree be entered on the minutes of this court and on the Register of Decrees of Title of said county.

In open court this.....19....

.....Judge.]

Acts 1917, p. 156.

§ 4215 (ssss). **Book of decrees, how made; index.** [It is contemplated by this Chapter that the book known as the Register of Decrees of Title shall be made up in the following manner: It shall be of such size as that each page may contain a full copy of the decree of title. Only one (1) decree should be entered on any page. Each page should have printed thereon the form of the decree of title as herein prescribed, with ample spacing left in the blanks. At the bottom of the page should be the words, "Entered and registered this.....day of.....19...., at.....o'clock....M., and certificate of title No.....issued thereon.Clerk."]

At the top of the page and preceding the copy of the decree should be the words, "Registered Title No....." The first decree entered is numbered, "Registered Title No. 1," the second, "Registered Title No. 2," and so on in continuous, consecutive order. The registered title number of a registered tract never changes, though any number of subsequent certificates may be issued thereon; therefore the registered title number and the certificate number will usually be different.

Even though several separate tracts may be joined in the same application, the judge should render separate decrees as to each tract; and these decrees should be separately entered and given separate registered title numbers. Every certificate of title and every owner's certificate and creditor's certificate must carry on it (in addition to its own certificate number) the registered title number of the decree under which the tract to which it pertains was registered.

A part of the register of decrees of title shall be an alphabetical index thereto, which the clerk shall carefully keep. Whenever a decree is entered on the register of decrees of title, the clerk shall immediately index the same in the name of the person in whose favor the title is registered, under proper alphabetical head; the name being followed by the registered title number. If the decree is in favor of more than one person, it shall be separately indexed under the name of each and all of them; the name of each of said persons being shown under the proper alphabetical head.]

Acts 1917, p. 157.

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§ 4215 (tttt). **Title register book. Registered title number. Index.**
[It is contemplated by this Chapter that the Title Register shall be a well-bound book with pages not less than 18 inches wide. It shall be labeled on the back with the words, "Title Register," followed by the name of the county. Additional labels may be put on to show what certificates are included (as, for example, "Certificates 1501-2000, inclusive"), or other similar information, for convenience's sake. It shall be printed and ruled in substantially the form here shown:

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TITLE REGISTER Registered Title No. _____	COUNTY _____ Certificate of Title No. _____ CERTIFICATE OF TITLE STATE OF GEORGIA, COUNTY OF _____ This is to certify that the title to the estate hereinafter mentioned in and to the following described tract of land, in said county, viz.: _____ is registered under the provisions of the Land Registration Act and thereby vested in _____ The estate owned by said _____ in said land is as follows: _____ subject to the following limitations, conditions, encumbrances, etc., viz.: _____ and to any other that may be noted hereon. Witness my hand and seal of office, this _____ day of _____, 19____, at _____ o'clock _____ M. (Official Seal) Entered and Registered (on transfer from Certificate of Title No. _____) *, this _____ day of _____, 19____, at _____ o'clock _____ M. Clerk. _____
---	--

TRANSFERS

TRANS- FERRED TO	Date of Instru- ment.	CONSIDERATION Total or Partial (If undivided in- terest, note here what interest is transferred.)	Voluntary or In- voluntary. (If in- voluntary, give reference to book and page where judgment on which order is- sued is recorded.)	If special or irregular, give reference to other records for particulars.	No. of the Certificate Issued to Transferee	REMARKS	ENTERED AND REGISTERED						CLERK'S SIGNATURE
							Yr.	Mo	Da.	Hr.	M.	A. M. P. M.	

SPECIAL ENTRIES AND NOTATIONS

Entered and Registered						CLERK'S SIGNATURE TO ENTRY		DATE CANCELED				CLERK'S SIGNATURE TO CANCELLATION	
Yr.	Mo.	Da.	Hr.	M.	A. M. P. M.			Yr.	Mo.	Dr.	Hr.	M.	A. M. P. M.

*In issuing first Certificate on a decree, strike the words in parenthesis.

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Registered Title No.		Certificate of Title No.															
IN FAVOR OF		DATE AMT.	Nature of Instrument. (If Mortgage or Creditor's Certificate, describe indebtedness. If special, give reference to record for details).	REMARKS	ENTERED AND REGISTERED				CLERK'S SIGNATURE	DATE CANCELED				Clerk's Signature to Cancellation			
					Yr	Mo.	Da.	Hr.		M.	A. M.	P. M.	Yr.		Mo.	Da.	Hr.
Creditor's Certificates																	

This Certificate of Title Canceled, and Certificate of Title No. issued in lieu thereof, this day of

19, at o'clock M. Clerk.

Owner's Duplicate Canceled*

*In case Cancellation is by order of Judge, state that fact and give reference to book and page of the minutes.

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The two pages thus facing each other on the register constitute the original certificate of title, when the blanks are duly filled in and signed by the clerk. The first certificate of title in the book should be numbered "Certificate No. 1," the next one "Certificate No. 2," and so on, in continuous, consecutive order. If a new book be opened, the numbering therein should begin with the number next succeeding the last number in the book just completed.

In registering a certificate of title, in addition to the certificate number, the registered title number should also be inserted. The registered title number is always the same as that which appears on the decree of title, by virtue of which the land to which the certificate relates was originally registered. Therefore every certificate of title registered in the Title Register bears a different certificate number from every other certificate of title registered therein, but all certificates of title which refer to the same registered tract, no matter how many such certificates may be issued in the course of time, bear the same registered title number.

The clerk shall keep an alphabetical index of the Title Register. This may most conveniently be kept in a separate book. Whenever a certificate of title is entered in the Title Register the clerk shall insert in the index, under proper alphabetical head, the name of the person in whose favor the certificate is registered, and the reference to the certificate number and the registered title number. Whenever a certificate is entered in the name of more than one person, the name of each shall be likewise alphabetically indexed.]

Acts 1917, p. 158.

§ 4215 (uuuu). **Entries.** [When registering a certificate of title upon a transfer the clerk shall bring forward and appropriately enter on the new certificate of title all entries and notations appearing on the certificate from which the transfer is made, except such as shall have been canceled. In transcribing entries brought forward the clerk will note under the column headed "Remarks" against such entries the words "Brought forward."]

Acts 1917, p. 162.

§ 4215 (vvvv). **Certified copies.** [The clerk shall, upon request of any person and the payment of lawful fees, issue a certified copy of any certificate of title or of any entry thereon, in like manner as he may issue certified copies of any other public record in his office, but whenever he so does he shall plainly mark in large legible letters across the face of the certificate the word "copy." If certified copy of a canceled certificate or entry shall be made, in addition to transcribing a copy of the entry of

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cancellation, the clerk shall also plainly mark the words "canceled certificate," or "canceled entry," as the case may be, across the face of copy.]

Acts 1917, p. 163.

§ 4215 (www). **Plat record. Copy.** [Whenever a plat of the premises, too large or too intricate for easy transcription on the Register of Decrees of Title or on the certificate of title, is a part of the description of the lands or is used to aid description, it shall not be necessary for the clerk to copy the same on the Register of Decrees of Title or on the certificate of title, but he shall record the same in one of the public record books in his office and in lieu of copying the plat shall note the existence of the same, together with a reference to the book and page where recorded. If the holder of the owner's certificate desires a copy of the plat attached as a part of his owner's certificate, the clerk shall make a copy and certify it and so attach it upon payment of a fee of \$1.00 for that particular service.]

Acts 1917, p. 163.

§ 4215 (xxxx). **Description, reference to.** [Whenever in the registering of any certificate of title or any notation or entry on the Title Register it is found that the description of the premises or the portion thereof involved, or any other detail in connection with the transaction, is too lengthy to be transcribed in full in the proper space on the Register, it shall be permissible to record the instrument, document, or writing in which such lengthy detail or description is contained on some public record book of the county, and, instead of setting forth the description or other detail, as the case may be, in extenso, on the Title Register, to state it in general terms with the reference for further particulars to the public record where recorded, thus: "For further detail, see Deed Book.....page.....," and such registration shall be adequate to all intents and purposes, and the record thus made on the public record shall be considered as a part of the certificate of title contained on the Title Register.]

Acts 1917, p. 163.

§ 4215 (yyyy). **Description, certified copy.** [Whenever any of the description or details of a certificate of title on the Title Register shall be set out in full in some other record of the clerk's office with reference thereto on the Title Register, as hereinbefore provided, like reference shall be made on the owner's certificate and on creditor's certificates when thereafter issued; but if the holder of such owner's certificate or creditor's certificate shall so require, the clerk shall make a full and complete copy of such record to which reference is made, and certify it as

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such, and attach it to the owner's certificate or the creditor's certificate, as the case may be. For making and certifying such copy of the recorded document or writing and attaching it to the owner's certificate, or creditor's certificate, as the case may be, the clerk shall be paid ten cents per hundred words in addition to the other regular fees in this Chapter provided.]

Acts 1917, p. 164.

§ 4215 (zzzz). **Form of owner's certificate of title.** [The form of the owner's certificate of title shall correspond in general form with the certificate of title, except that it shall be headed with the words, "Owner's Certificate of Title." It is suggested that it be prepared on paper of suitable size, to be folded into four pages; the first page to contain the certificate proper (i. e., omitting the notations, and special entries); the inner pages (i. e., pages 2 and 3) to be ruled and written or printed (preferably the latter) in conformity with the form herein shown for the printing and ruling of the Title Register for the entry of transfers, liens, encumbrances, creditor's certificates, and other like matters, these two pages being treated for this purpose as a single sheet, so that ample space will thereby be given for the crosswise extension of the entries. On the back or fourth page it is to be endorsed thus:

OWNER'S CERTIFICATE OF TITLE.

Registered Title No.....
 Certificate No.
 Issued to

Georgia, County.

Entered and Registered (in lieu of certificate No., which has been canceled).

This day of
 19...., at.....o'clock.....M.

.....
 Clerk Superior Court.

In case of the first issuance of the owner's certificate on the granting of a decree of registration the words shown in parenthesis in the endorsement above should be omitted.

It is suggested that convenience will be subserved by folding the certificate in the manner of folding documents written on legal cap or foolscap paper, and by writing or printing the endorsement in the style and manner in which similar endorsements are usually put on legal documents. When printed blanks are prepared for use in this connection, it is also suggested that blank form of transfer be printed on part of the fourth page, other

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than that part used for the endorsement. Space, however, should be left on the fourth page for such entries as the clerk may be required to make from time to time, under the provisions of this Chapter, certifying that the certificate is valid with all entries to date noted.]

Acts 1917, p. 164.

§ 4215 (aaaaa). **Clerk's duty.** [The clerk shall first satisfy himself, before registering any voluntary transfer, that the same is witnessed and attested or acknowledged in accordance with law; and he and the sureties on his bond are liable for any loss or damage occasioned to any person through registration of a transfer not so executed.]

Acts 1917, p. 165.

§ 4215 (bbbbbb). **Forms of transfer; whole estate, undivided interest, divided portion, to secure debt.** [The following are prescribed as the regular forms of transfer. Other forms may be used in accordance with the provisions of this Chapter:

TRANSFER OF WHOLE OR REGISTERED ESTATE.

In consideration of
the undersigned,
hereby transfers, sells, and conveys to
..... his entire right, title, estate, and interest in the
tract of land described in the certificate of title No., hereto
attached, registered as Registered Title No. in the office of
the clerk of the superior court of County,
Georgia. This.....day of.....19....

Signed, sealed, and delivered in presence of:

.....
.....

TRANSFER OF UNDIVIDED INTEREST IN REGISTERED ESTATE.

In consideration of the undersigned,
..... hereby transfers, sells and
conveys to an undivided
interest in the tract of land described in the certificate of title No.
hereto attached, registered as Registered Title No. in the
office of the clerk of the superior court of
County, Georgia. This.....day of.....19....

Signed, sealed, and delivered, in the presence of:

.....
.....

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TRANSFER OF DIVIDED PORTION OF A REGISTERED ESTATE.

In consideration of the undersigned hereby transfers, sells, and conveys to his entire right, title, interest, and estate in and to the following lands, viz.: being a divided portion of the tract of land described in the certificate of title No. hereto attached, registered as Registered Title No. in the office of the clerk of the superior court of County, Georgia.

This.....day of.....19....

Signed, sealed, and delivered, in the presence of:

TRANSFER TO SECURE DEBT, WITH POWER OF SALE.

To secure a debt payable to in the sum of evidenced as follows: the undersigned hereby transfers, sells, and conveys to said..... all the title of the undersigned in and to the tract of land described in the certificate of title No., herewith shown, registered as Registered Title No. in the office of the clerk of the superior court of County, Georgia, with power to sell the same after lawful advertisement, without foreclosure, in accordance with the provisions of the Land Registration Act, if any part of said debt is not paid at maturity.

This.....day of.....19....

Signed, sealed, and delivered, in the presence of:

Acts 1917, p. 165.

§ 4215 (cccc). **Form of creditor's certificate; indorsement.** [The following is the form of creditor's certificate referred to in this Chapter:

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CREDITOR'S CERTIFICATE.

State of Georgia, County:

Registered Title No.

Certificate No.

I hereby certify that the title to the estate hereinafter mentioned in the following described land lying in said county, viz.:

..... is registered under the provisions of the Land Registration Act and thereby vested in

..... as security for a debt created by the holder of the owner's certificate of title to said estate, viz.: (here insert name of the holder of the owner's certificate); said debt being particularly described as follows:

..... with power conferred to sell the same after lawful advertisement, without foreclosure, in accordance with the provisions of the Land Registration Act, if any part of said debt is not paid at maturity. The estate in said land so held is as follows:

..... subject to the following limitations, conditions, encumbrances, etc., viz.: and such other as may be noted hereon.

Witness my hand and seal of office, this day of 19...., at o'clock M.

..... Clerk Superior Court, County.

(Official Seal.)

All uncanceled entries appearing on the certificate of title at the time the creditor's certificate is issued shall be noted and entered on the creditor's certificate.

The creditor's certificate shall bear an endorsement on its back in the following form:

CREDITOR'S CERTIFICATE.

Registered Title No.

Certificate No.

On lands registered in the name of

..... Issued to

Georgia, County.

Registration of land titles.

Entered and registered this day of
 19...., at.....o'clock.....M.

.....
 Clerk Superior Court.]

Acts 1917, p. 168.

§ 4215 (ddddd). **Interest or portion.** [Where only a portion of the registered land or only an undivided interest is transferred to secure a debt, the instrument of transfer and the creditor's certificate may be in the same form as those prescribed in the two preceding sections, with the exception that the portion or the undivided interest shall be distinctly stated.]

Acts 1917, p. 169.

§ 4215 (eeeeee). **Form of transfer on judge's order.** [Where the judge orders a transfer to be made under any of the provisions of this Chapter, the judge's order of transfer shall be in the following form, unless the exigencies of the case require a different form:

JUDGE'S ORDER OF TRANSFER.

In the Superior Court of County, Georgia:

For good cause shown to the court, the clerk is directed to cancel the Certificate of Title No., Registered Title No., standing in the name of on the Title Register and to register a certificate of title in lieu thereof, as follows:

in accordance with the decree of court rendered in suit of
 vs.
 in court; and transfer of title is accordingly ordered. You will enter this transfer upon the Title Register, noting upon the same a reference to the book and page upon which the above-recited order or decree may be found.

This order of transfer to be effective upon the presentation of the outstanding owner's certificate, which you will cancel. *

.....

This.....day of.....19....

.....Judge.

(*If the court has not been able to require the production of the outstanding owner's certificate, the judge shall erase this sentence from the order and substitute in the blank space below it the following: "You will cause notice to be published, in accordance with the law, that the certificate is canceled.")

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If the exigencies of the case require a variation from form above prescribed, the clerk shall also record the judge's order on the minutes of the court, and, under the appropriate heading in the entry of transfer on the Title Register, write the words "Special, See Minute Book, page" If the judge's order of transfer is made without obtaining production of the outstanding owner's certificate, the clerk in entering the transfer shall, under the heading "Remarks," write "Owner's certificate not produced, but canceled by publication."]

Acts 1917, p. 169.

§ 4215 (fffff). **Form of mortgaging. Registry of mortgages.** [The regular form of mortgaging shall be as follows:

The undersigned
to secure the following indebtedness, viz.:
.
.
mortgages to
the estate, title, and interest of the undersigned in and to all of the tracts of land described in the certificate of title No., herewith shown, registered as Registered Title No. in the office of the clerk of the superior court of County, Georgia.
.

Signed, sealed, and delivered, in the presence of:

.
.
.

If only a part or undivided interest is mortgaged, strike the word "all" and insert particularly a description of the portion or interest mortgaged.

Mortgages so executed may be registered as regular instruments, as hereinbefore provided. Mortgages in other forms and with other provisions may be registered, but shall also be recorded in accordance with the provisions of this Chapter regulating the registration of such irregular instruments.]

Acts 1917, p. 170.

§ 4215 (ggggg). **Form of notation of delinquent taxes and assessments.** [Delinquent taxes and assessments shall be noted on the Title Register, upon the officer charged with the collection of taxes filing with the clerk a certificate substantially in the following form:

NOTATION OF DELINQUENT TAXES.

I certify that (State, County, or City, as the case may be) has a lien for unpaid taxes (or assessments, as the case may be) for the year 191.... against the land described in certificate No., Registered Title No., registered in the

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office of the clerk of the Superior Court of
County, in the amount of \$. The clerk will please note
the same on the Title Register.

This.....day of.....19...

.....,
Tax Collector.]

Acts 1917, p. 171.

§ 4215 (hhhhh). **Form of notation of judgment.** [The regular form
to be used by any person, his agent or attorney, desiring a judgment to be
noted on the Title Register is as follows:

NOTATION OF JUDGMENT.

To the Clerk of the Superior Court.....County, Georgia:
Please note on certificate of title No., Registered Title
No., a judgment issued from
Court of
in favor of vs.
..... for the amount of \$.....

This.....day of.....19...

.....]

Acts 1917, p. 172.

§ 4215 (iiii). **Form of notation of special right. Reference to descrip-
tion.** [The regular form to be used where any person desires a notation
to be made of any lien, encumbrances, or special right (other than volun-
tary transactions, and other than those herein otherwise provided for) is
as follows:

REQUEST FOR NOTATIONS OF SPECIAL RIGHT.

The undersigned
claims against the land described in certificate No., Regis-
tered Title No., registered in the office of the clerk of the
Superior Court of County, the fol-
lowing lien (encumbrance, equity, or special right, as the case may be):
.....
in proof of which reference is had to the following record or court pro-
ceeding, viz.:
.....
Please note the same upon the Register of Title accordingly.

Sworn to and subscribed before me the day of
.....19....

The above form may be used to give notice of a lis pendens.

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If the description of the alleged encumbrance, equity or special right be too lengthy to note with convenience on the blanks in the Title Register, the request for the notation of the same shall be recorded on the deed book of the county and the clerk shall register only a general description of it, but shall note, under the appropriate column heading in the Title Register, the reference "Special, see Deed Book page"]

Acts 1917, p. 172.

§ 4215 (jjjj). **Cancellation of creditor's certificate.** [Authority may be given to register the cancellation of a creditor's certificate by the owner thereof writing thereon "Canceled. The clerk will please cancel the same on the Title Register," dated and signed in the presence of an officer authorized to attest deeds. If the person owning the creditor's certificate is not the person in whose name it was issued, and if the original creditor shall not have endorsed it in blank, the owner signing the cancellation shall also make affidavit that he is the owner of the creditor's certificate and entitled to cancel it. The creditor's certificate shall be surrendered to the clerk at the time of the registration of the cancellation.]

Acts 1917, p. 173.

§ 4215 (kkkk). **Cancellation of entry.** [Authority to the clerk to cancel entries or other liens, mortgages, encumbrances, special claims, and like matters may be conferred by the person in whose favor the same exists, or his personal representative, executing a request as follows:

REQUEST TO CANCEL ENTRY.

To the Clerk of the Superior Court of County:

You are directed to cancel the entry registered in my favor on certificate of title No., Registered Title No., claiming the following lien (encumbrance or special right, as the case may be)...

This.....day of.....19....

.....]

Acts 1917, p. 173.

§ 4215 (IIII). **Voluntary transaction, registry of.** [Where it is desired to register a voluntary transaction other than those for which forms have been otherwise indicated or prescribed, the instrument showing the voluntary transaction shall be presented along with the owner's certificate, and the same shall be noted, not only on the certificate of title in the Title Register, but also on the owner's certificate. If the instrument be already recorded on some public record, reference shall be made in the Title Register and on the owner's certificate to the book and page where it is re-

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corded; if it be not already recorded, the clerk shall record it, making like reference in the Title Register and on the owner's certificate to the book and page where recorded.]

Acts 1917, p. 174.

§ 4215 (mmmmmm). **Owner's certificate, entries and notations.** [The holder of an owner's certificate of title may at any time present it to the clerk, and, if the certificate of title on the Register has not been canceled, the clerk shall thereupon enter on the owner's certificate all entries and notations of every kind which shall appear on the certificate of title, if all such entries shall not have already been entered on the owner's certificate, and shall thereupon endorse upon the owner's certificate the words "Valid, with all entries noted to this date. This day of, 19...., ato'clockM. signing the same officially.]

Acts 1917, p. 174.

§ 4215 (nnnnn). **Filing cases.** [The county commissioners or other officers in each county having in charge county business shall furnish the clerk with the necessary durable filing cases, and he shall carefully number and file away all papers relating to registered lands and dealing therewith. All the papers relating to each registered title shall be filed together and separately from the papers relating to any other registered title; they shall be filed away in such regular consecutive numerical arrangement as to make them easily accessible at all times. Vertical filing is recommended.]

Acts 1917, p. 174.

§ 4215 (ooooo). **Fees of clerk, examiner, and sheriff. Cost deposits. Award of costs.** [The fees payable under this Chapter shall be as follows:

TO THE CLERK OF THE SUPERIOR COURT:

For all services in initial registration from the time of filing the petition up to and including the registration and issue of the first certificate and owner's certificate registered on a decree of title, four dollars and postage, unless separate decrees are registered, when he shall get one dollar extra for each additional decree and the registering and issuing of the first certificates thereon. In contested cases three dollars additional may be taxed as costs.

Registering a transfer and registering thereupon certificate of title and issuing new owner's certificate and making necessary cancellations in connection therewith, full service, one dollar.

For issuing a duplicate certificate in lieu of a lost certificate, fifty cents.

For issuing a certified copy of certificate of title and entries thereon, one dollar.

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For noting a judgment or other lien on Title Register, fifteen cents.

For certifying an owner's certificate as "valid, with all entries noted to date," twenty-five cents.

For the notation or registration of any mortgage or other voluntary transaction not herein otherwise provided, including every act necessary therefor, and, in the case of creditor's certificate, including the issuance of the creditor's certificate, seventy-five cents.

Other notations and entries (not otherwise provided for), fifty cents.

In case further record of an instrument is required on account of its form, the clerk shall be paid for the record of such instrument at the rate of ten cents per hundred words, in addition to other fee herein prescribed.

For each entry of cancellation, twenty-five cents.

In cases of involuntary transactions, and in case of caveats and other matters referred to the court for action, the clerk shall be allowed, in addition to the fees herein otherwise prescribed, the sum of ten cents per hundred words for recording such proceedings upon the minutes of the court, and fifty cents for each judgment rendered therein.

If any matter be carried to the Supreme Court the clerk's fees in connection with proceedings to take the case to the Supreme Court shall be the same as in other cases carried from the superior court to the Supreme Court.

TO THE EXAMINER OF TITLES:

For examining a title and making report to the court, one dollar per thousand (or fraction thereof) on the value of land, as determined by the court (but not to exceed a maximum of one hundred dollars), and postage, and ten dollars.

In contested cases, for hearing the case and making report to the court, the judge may in his discretion allow additional compensation, but in an amount not exceeding the same fee as that allowed an auditor for reporting his findings in equity cases under section 5148. He shall not be paid extra for reporting the evidence; but when a stenographer is used by consent of the parties or order of the judge, the stenographer shall be paid his usual fee.

TO SHERIFFS:

For ascertaining and reporting to the courts the names and addresses of the persons actually occupying the premises described in the petition, one dollar.

For each service of process and notice required, one dollar.

For posting a copy of petition upon the premises, fifty cents.

For any other services of the clerk, sheriff, or surveyor, not especially provided for herein, a fee to be fixed by the court in conformity with

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what is usual and lawful for similar services rendered by such officer in ordinary cases.

With each application for initial registration the applicant shall deposit with the clerk the sum of twenty dollars as a deposit to guarantee costs, and may from time to time be required by the court to make additional deposits. The clerk shall not be required to enter any notation, entry, or registration upon the Register of Title or the owner's certificate, unless fees prescribed therefor are paid to him. In all contested cases, and in all matters referred to the judge for his direction by any of the provisions of this act, he shall award the cost of such proceeding accordingly as in his discretion the justice of the case may dictate, and to that end may assess all the costs against one of the parties, or may divide it among the parties in such ratio as seems just.]

Acts 1917, p. 175.

§ 4215 (ppppp). **Date law effective.** [This Chapter shall take effect on the first of January next after its passage.*]

Acts 1917, p. 177.

*January 1, 1918.

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EIGHTH TITLE.

Of Contracts.

CHAPTER 1.

General Principles.

§ 4216. (§ 3631.) What is a contract.

Certainty: Contract employing plaintiff to cut timber, but not definitely describing the timber or stating when the cutting was to be done, was too uncertain to furnish basis for recovery of damages for breach thereof. 141/117 (2) (80 S. E. 559).

Contract here giving defendants the use of certain land for a pumping station was void for uncertainty. 141/219 (80 S. E. 716).

Where petition counted on purported written contract which was so indefinite that it did not show that plaintiff was a party or that there was any consideration or any time specified for performance, demurrer was properly sustained. 143/846 (85 S. E. 993).

Letter written by defendant to plaintiff's agent, stating that: "B. tells me that F. will take all his corn and fodder on what he owes. Settle with him and send me the amount due, and I will take it up"—was too indefinite and ambiguous to constitute contract. 17 App. 481 (1) (87 S. E. 719).

Statement in contract that shipment would be made "as soon as possible" meant within a reasonable time, and was not so indefinite as to render contract unenforceable, it being also stated that it would be sixty days

before shipment could be made. 24 App. 630 (2) (101 S. E. 692).

Written agreement between two persons, which provides that, in consideration of certain sum having been paid by promisee to promisor, latter obligates himself to perform certain promises and undertakings stipulated therein, constitutes valid contract, provided such promises and undertakings are sufficiently certain and definite to render them capable of performance. 24 App. 719 (1) (102 S. E. 71).

Written contract, which required plaintiff to furnish timber from described lands, and by which defendant agreed to cut all timber into lumber and load on cars at stipulated price, and to furnish plaintiff certain cross-ties at fixed price, and to have mill of certain capacity in operation within twenty days from contract, was sufficiently certain and definite to be capable of enforcement. 24 App. 719 (2) (102 S. E. 171).

Definition: A contract is an agreement between two or more parties for the doing or not doing of some specified thing; there is no difference between a contract and an agreement. 143/846 (85 S. E. 993), citing 1 Words & Phrases (2d Series) 171, 172.

§ 4217. (§ 3632.) Executed or executory.

Automobile dealer: Dealer's contract establishing such a relationship between local dealer and defendant distributor of automobiles, which provides that distributor is to furnish (provided he is able to do so), and in which dealer, acting in his capacity as such,

agrees to accept, certain number of cars to be selected from attached schedule of models at prices which are subject to change by distributor, does not constitute binding executory contract of purchase and sale, and it is necessary that dealer shall, during life

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of contract, particularly specify cars which are to be furnished, in order to consummate agreement as one of purchase and sale. 24 App. 638, 639 (3) (102 S. E. 47).

Even if suit against distributor to recover deposit made under dealer's contract be construed as claim under terms of executed contract yet on consideration of its object and that agreement is inchoate as to any purchase and sale, dealer's failure to specify and order out any of cars to be furnished by distributor would not therefore constitute such nonperformance on dealer's part as to prevent his recovery of bonus paid in under its terms, nor could such failure be pleaded by way of damages in answer to such suit. 24 App. 638, 639 (3) (102 S. E. 47).

Breach: Where contract of purchase and sale of goods was executory on both sides, notice by purchaser to seller to cancel purchaser's order was breach of contract, and seller could not by attempt to deliver the goods treat contract as performed on his part and sue purchaser for full purchase price. 23 App. 633 (1) (99 S. E. 138).

Charge in action for breach of contract to give note with deed to secure it on theory that contract was executed by both parties was erroneous, where

§ 4219. (§ 3634.) Specialty.

Consideration: Plea here was sufficient plea of want of consideration for note sued on as against general demurrer. 16 App. 436 (1) (85 S. E. 625).

§ 4222. (§ 3637.) Essentials of a contract.

Description: Where a contract for the sale of real estate located the land at a certain corner of certain streets, giving the length of the sides of the lot in feet, but did not disclose on which street either of these sides abutted, or give data from which the land could be located, it was fatally defective, and the instrument will not serve as a basis of an action for damages for breach of the contract. 141/126, 127 (80 S. E. 630).

unsupported by evidence. 145/106 (1) (88 S. E. 569).

Consideration: Where grantor of right to municipality to use water from a spring received water from the municipality, and the latter expended money in making water connections for grantor in accordance with terms of contract, contract could not be cancelled on ground that it was void for want of consideration. 140/611, 612 (2) (79 S. E. 533).

Future sale: Executory contract for future sale of commodity is not enforceable unless by terms of agreement it is so intended, and there is mutuality of obligation and certainty as to subject matter and price. 24 App. 638, 639 (3) (102 S. E. 47).

Performance: Party claiming solely under and by virtue of terms of alleged executed contract must show performance on his own part. 24 App. 638, 639 (3) (102 S. E. 47).

Price: Where there has been no actual delivery of personal property and no agreement as to price, but vendor and vendee agree to meet at some future day, when vendee is to inspect property and a price is to be agreed upon, the contract is executory, title remains in vendor, and property is subject to judgment obtained against the vendor. 22 App. 715 (97 S. E. 91).

Plaintiff, in action on sealed note, may by amendment strike from petition recital of consideration without changing cause of action. 17 App. 495 (2) (87 S. E. 716).

Description of land in contract of sale is sufficiently definite where so described as to indicate grantor's intention to sell particular lot. 145/65 (1) (88 S. E. 960; 18 App. 178 (89 S. E. 175)).

Description of land by street and number and dimension of lot, including alley, was sufficiently definite. *Id.*

Description here of personal property in agreement by administrator to

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sell was not sufficiently definite to render agreement basis of recovery for breach thereof. 145/616 (3-a) (89 S. E. 689).

Description of land in contract is sufficiently definite where premises are so described as to indicate grantor's intention to sell particular lot of land. 148/273 (1) (96 S. E. 387).

Description of land in contract as vacant lot on west side of named street in named city, said lot being between certain avenue and a certain other street, size 40 x 185 more or less to an alley in the rear, was sufficiently definite. 148/273 (1) (96 S. E. 387).

Option contract, describing land as "All of my entire property according to my tax returns of 1909 and 1910, also the Central Hotel," and reciting, "This is meant to cover all my real and personal property both of every description in the city of Sylvester,

whether improved or unimproved," failed to identify property and court did not err in dismissing action on such contract on demurrer. 19 App. 53 (90 S. E. 1035).

Money: Where, so far as it appears in suit upon due bill, there was no demurrer, and where only defense was that due bill had been paid, finding for plaintiff was not vitiated merely because writing which was evidence of defendant's indebtedness and basis of suit did not contain the word "dollar" show that debt was payable in money, otherwise than by use of the figures "227.45." 18 App. 208 (1) (89 S. E. 166).

Several instruments: Instead of reducing agreement to writing, parties may adopt by reference terms of contract already in writing. 121/817 (49 S. E. 763); 17 App. 93 (2) (86 S. E. 333).

§ 4223. (§ 3638.) Contracts absolute or conditional.

Applied. 15 App. 353, 357 (83 S. E. 276).

Attorney's opinion: Bid for purchase of municipal bonds providing, "We are to be furnished with a full and complete certified copy of transcripts establishing the legality of the issue as a direct obligation of named city, satisfactory to our attorneys, prior to our acceptance and payment of the bonds," was conditional bid; and bona fide opinion rendered by such attorneys, to effect that legality of issue had not been satisfactorily shown, would prevent forfeiture and require return of deposit made with the bid. 21 App. 805 (1) (95 S. E. 474).

Question in such case is, not whether the bonds were in fact valid or invalid, but whether the opinion was bona fide and not rendered capriciously or in bad faith. *Id.* 805 (2).

Where, in suit by bidder to recover forfeited deposit which had accompanied bid, it was shown that opinion by attorneys was that legality of issue was not satisfactorily shown from transcripts furnished, and where evidence was within itself without conflict, and nothing was disclosed to

show collusion between bidder and its attorneys, or any fraudulent purpose on part of latter, and legal opinion contained nothing by which it could be reasonably inferred that it was capriciously or fraudulently made, it was not error for court to direct verdict in favor of plaintiff. 21 App. 805 (3) (95 S. E. 474).

Indemnity: Where trust company, under contract of guaranty, agreed to assume and pay off liabilities of bank upon condition that makers of bond furnished to it would indemnify company to certain extent, and upon further agreement that certain banks should afford additional indemnity, contention raised by demurrer that indemnity contract or bond of directors of bank was binding on makers thereof only upon further consideration that certain national banks would additionally guarantee and indemnify the company against loss to an extent named is without merit. 22 App. 348, 349 (4) (95 S. E. 1025).

Mutual covenants: Promises mutual to extent that each affords sole consideration to other will not be construed as independent, but will, in absence of

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clear indications to contrary, be taken as dependent one upon the other; while, ordinarily, dependent covenants are such as mutually afford to the other the whole consideration, still stipulation and circumstances of contract may be such as to render covenants mutual and dependent even though one of them affords to the other only a part of its consideration; in such case question whether covenants are mutually dependent is to be determined by reference to rational

intent of parties as disclosed by instrument, read in light of surrounding circumstance and purposes for which contract is made. 22 App. 280 (1) (95 S. E. 1028).

Note: Where, by agreement with payee in note, indorser was to be paid a consideration of a certain per cent. on all merchandise sold to the maker, mere fact that such per cent. was never paid did not invalidate contract and relieve indorser from liability. 23 App. 609 (99 S. E. 222).

§ 4224. (§ 3639.) Conditions precedent and subsequent.

Applied. 15 App. 353, 357 (83 S. E. 276).

Approval: Where building contract stipulates that payments are to be made to contractor in installments only when work has been approved by architect and that no money shall be paid except upon architect's orders, petition in action by contractor against owner of building does not state cause of action, in absence of allegation that work has been approved by architect, or that any order has been given by architect for payment of balance alleged to be due, or that stipulation has been waived by owner. 18 App. 647 (1) (90 S. E. 223).

Where building contract provides that all work shall be done in accordance with plans and specifications thereto attached and made a part of the contract, and the attached plans and specifications are headed, "Specifications of labor and materials for a frame bungalow to be built for [owner], according to plans and these specifications as prepared by [named architect]," such contract will be construed as naming an architect. *Id.* 647 (1-a).

Bond for title: Where bond was conditioned to execute title to realty describing as fronting 55 feet on a certain street, upon payment of purchase-price, and before paying price obligees transferred bond and transferee sold land as containing 55 feet, at so much per front foot, transferee can not recover against his transferor because land measured only 53.9 feet. 145/637 (89 S. E. 719).

Certificate: Stipulation in building contract that compensation shall be due and payable owner on certificate of a named engineer is a condition precedent. 13 App. 847 (2) (81 S. E. 263).

Collusion: Where, under terms of contract in question, defendant purchaser agreed to pay to vendor certain sum due on purchase price if in claim case then pending it should be determined that land was not subject to execution in favor of another, no cause of action on contract is set out in petition alleging that in the claim case the land was found subject to the execution, although it alleged that such finding was the result of collusion between defendant, who was claimant in that case, and plaintiff in execution, and that verdict and judgment were void. 23 App. 549 (99 S. E. 46).

Construction: In construing contract of guaranty with reference to whether or not notice referred to amounted to condition precedent to liability thereunder, instrument is not to be construed most favorably either for or against guarantor, but terms and language are to have reasonable and ordinary interpretation, according to intent of parties as disclosed by instrument read in light of circumstances and purpose for which it was made. 20 App. 429 (2) (93 S. E. 106).

Deed: Where preamble recited that whereas by agreement the grantor was to convey to the grantee certain land on "certain conditions which have since been complied with," but the habendum clause contained no

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such conditions, the conditions of the agreement were merged in the conveyance and the grantee held the land free therefrom. 140/519 (1) (79 S. E. 138).

Delivery: Provision of contract for sale and purchase of coal, with equal monthly deliveries, that if mines were unable to operate, or their output was curtailed, by causes beyond seller's control, it should not be liable for resulting failure to deliver, created conditions subsequent. 262 Fed. 555 (1).

Note: One who signs or indorses note as surety can not in defense to action thereon, either by innocent payee or any other bona fide holder for value, set up that principal maker, to whom he intrusted note, delivered it in violation of condition that certain other person or persons should first sign or indorse it. 20 App. 576 (3) (93 S. E. 173).

Notice: Under bond given by contractor for faithful performance of building contract providing that the bond is executed by surety upon certain conditions, which shall be conditions precedent to right of owner to recover thereunder, and one condition is that surety shall be notified in writing of any act on part of principals which may involve loss for which surety is responsible, etc., where contract is abandoned by contractors, giving of notice thereof to surety is condition precedent to recovery on the bond. 21 App. 758 (2) (95 S. E. 113).

Plead condition: Where certificate of engineer is condition precedent to payment of compensation, allegation of compliance with such condition is essential to maintenance of action. 13 App. 847 (2) (81 S. E. 263).

Petition in action on alleged contract to "take-up" balance of debt was demurrable, where it did not allege compliance with condition of such contract that corn and fodder delivered should be allowed as credit on debt. *Id.*

Iron safe clause in fire insurance policy is warranty binding on insured; and where plaintiff suing on such a policy shows by petition that policy contains such a clause, but fails to allege compliance therewith, or reasons

for non-compliance, no cause of action is set out. 147/47 (3) (92 S. E. 930).

Where plaintiff in action on life insurance policy failed to allege payment of premiums, which payment was condition precedent to recovery, it was error to overrule demurrer to petition. 18 App. 517 (1, 2) (89 S. E. 1086).

If, by terms of contract of guaranty, intent of parties is ascertained to be that liability on part of guarantor is conditioned upon furnishing to him of information of acts of default by party for whose benefit guaranty is made, guarantor may stand upon precise terms of condition to obligation, and in suit on such contract plaintiff must allege and prove performance of condition which was prerequisite to his cause. 20 App. 429 (2) (93 S. E. 106).

Where suit was brought against guarantor under agreement reciting that "In accordance with your request I will guarantee the account of P. with your company to the amount of \$1000. In case accounts are not settled promptly in thirty days, please notify me of same," followed by address and signature, court did not err in overruling demurrer setting up that petition failed to show that plaintiff had given to defendant notice mentioned in the agreement. 20 App. 429 (2) (93 S. E. 106).

Petition showing that plaintiff entered into written contract with defendant, pursuant to which he deposited certain sum, for the right of exclusive sale of certain motor car in named county, deposit to be refunded on his sale of four cars, but not showing that he complied with the condition, or that he had any valid reason for non-compliance, or that defendant had breached the contract, set forth no cause of action. 24 App. 306 (100 S. E. 718).

Recovery: Where debtor and creditor entered into contract by which creditor agreed to delay collection of debt upon compliance with two distinct conditions, he may enforce indebtedness if one of conditions is not complied with. 145/565 (1) (81 S. E. 886).

Release: Refusal of injunction to restrain levy of *fi. fa.* on ground that

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portion of land levied on had been released was not error, where release was upon condition, and it did not appear that such condition had been complied with. 146/180, 181 (1) (91 S. E. 21).

Use: Where land is conveyed to be used for certain purpose, with clause of

forfeiture if it ceased to be used for object specified, whole estate does not cease if land be permitted to be put to minor use, provided that in main it is used for purpose for which it was conveyed. 146/812 (92 S. E. 642).

§ 4226. (§ 3641.) **Novation.**

Completeness: In order that existing contract shall be discharged by making of new and inconsistent agreement by parties thereto, new contract must be so complete in all of its terms as to bind each of the contracting parties. 19 App. 248 (3) (91 S. E. 284).

Consideration: In order that there may be novation of contract it must be shown that another contract containing other and different terms from original had been agreed upon, and that there was consideration. 145/851 (1) (90 S. E. 52).

Gaming contract: Where contract for sale of cotton, apparently legal, was transferred to innocent transferee, and seller gave note for damages agreed on in contract, without disclosing illegality of contract, and maker of note gave new note, there was novation which precluded setting up illegality of original contract in action on note. 14 App. 344, 345 (5) (80 S. E. 731).

Note: Where landowner took from cropper rent note containing contract of tenancy, owner suing tenant to administer crop through receivership can not escape effect of written contract by testifying that execution of contract was not intended to change former contractual relation, but was only to furnish collateral on which to obtain credit by assignment of lien as landlord. 146/824 (92 S. E. 633).

Where A sold to B an automobile, taking in the trade certain notes of C, which B verbally guaranteed to pay, and after notes fell due A took new notes from C, and turned over to him the original notes, A could not recover from B the purchase price of the automobile in suit on open account, and court did not err in granting nonsuit. 18 App. 506 (89 S. E. 599).

Where payee of note for purchase price of personalty, in which title is

reserved in vendor, takes new note, and cancels and surrenders old note, consideration of new note being partly a renewal of old note and partly sale of additional property, and title to both original and additional property is reserved therein, there is such a novation of the first contract as will work discharge of original lien, as to intervening purchaser for value of any part of the original property. 19 App. 172 (91 S. E. 242).

Payment: Plea to suits on notes, setting up subsequent agreement, whereby defendant was to work with plaintiff and part of his salary was to be retained to apply on payment, and discharge after year in breach of contract, and that new contract superseded notes, showing on its face that original debt was not extinguished, but only a change in method and time of payment, did not set up a novation. 24 App. 34 (99 S. E. 780).

Release: Testimony is insufficient to show novation by which defendant was substituted for plaintiff's debtor and that plaintiff accepted him in lieu of original debtor, where none of the testimony showed that plaintiff agreed to release original debtor. 18 App. 207 (1) (89 S. E. 79).

Sale: Fact that buyer of fertilizer material has sold his factory and discontinued its business, which fact was communicated to seller, raised no legal obligation on part of seller to accept buyer's transfer of contract to its successor. 20 App. 660, 662 (8) (93 S. E. 532).

Sheriff: Contract entered into by plaintiff, whereby another was substituted as debtor in place of sheriff, amounted in itself to an abrogation of demand against the sheriff. 22 App. 680 (97 S. E. 207).

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§ 4227. (§ 3642.) **Mutual temporary disregard of contract.**

Applied. 24 App. 717 (4) (102 S. E. 137).

Conditional sale: Where personalty was sold conditionally, price to be paid in installments, failure to pay some installments and acceptance of lesser payments did not require notice prescribed by this section, as condition precedent to suit in trover. 15 App. 678 (2) (84 S. E. 165).

Jury: Question whether there had been such mutual disregard of terms of contract as is contemplated by this section, was for jury. 15 App. 353 (5) (83 S. E. 276).

Notice: Where debtor agreed with creditor to delay enforcement of debt, provided debtor should make certain payment, keep certain property insured, pay taxes, and pay at

maturity certain notes of third person, which were deposited by debtor as collateral security, failure to comply with latter condition, when not waived, entitled creditor to sue without giving notice. 141/565 (2) (81 S. E. 886).

Where terms of contract have been departed from by both parties, reasonable notice of intent of one party thereafter to rely thereon must be given. 143/159, 160 (4) (84 S. E. 447).

Quantity: Seller's forbearance and consent to changes in times and amounts of deliveries, with recognition that yearly amount was not to be changed, did not excuse buyer from taking yearly amount contracted for. 144/75, 76 (2) (86 S. E. 216).

§ 4228. (§ 3643.) **Entire or severable contracts.**

Architect: Where architect contracts to furnish plans and specifications, together with estimates of cost, for erection of building, and one sum is to be paid for entire service, there is an entire contract; and if, after furnishing plans and specifications, he should, without fault of other party or what would amount to consent of that party, fail or refuse to furnish estimate, there would be a breach of contract and he could not recover for such part performance. 23 App. 236 (1) (98 S. E. 188).

Conditions: Where plaintiff bases right to recover upon express contract, which is entire and indivisible, he can not recover unless he has performed all his obligations under the contract. 19 App. 518, 519 (5) (91 S. E. 913).

Criterion: In determining whether contract is entire or severable criterion is to be found in question whether whole quantity, service, or thing—all as a whole, is of the essence of the contract; if it appear that contract was to take the whole or none, then contract would be entire. 19 App. 518 (2) (91 S. E. 913).

Death: Contract under which deceased had paid certain amount of cotton for his board, washing and sewing for one year was not severable, so as to

entitle his personal representative to recover portion of cotton on ground that, due to maker's death, contract had been only partly performed. 17 App. 550 (1) (87 S. E. 831).

Election: Where, after breach of contract, opposite party not only retains articles received but puts them to his own use, there is an election to abide by the terms of the original contract and such opposite party thereafter holds under those terms the articles actually received. 23 App. 236 (1) (98 S. E. 188).

Entire contract: Where contract is entire whole contract stands or falls together. 19 App. 518, 519 (3) (91 S. E. 913).

Insurance: Provision of policy that funeral benefit provided therein is weekly term insurance renewable at option of company refers solely to funeral benefits, or death indemnity, and not to sickness or accident features of policy, and company must continue latter element of its insurance as long as premium is tendered. 18 App. 494 (3) (89 S. E. 633).

Intention: Whether contract be entire or severable depends on intention of parties. 145/559 (1) (89 S. E. 486).

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Quantum meruit: Where plaintiff has performed part only of indivisible contract, and defendant has accepted this part performance, plaintiff can recover on quantum meruit, or in *assumpsit*, but he can not recover on contract itself. 19 App. 518, 519 (4) (91 S. E. 913).

Where work to be performed under indivisible contract has not been done according to terms, yet if service is received and is of benefit to party receiving it, he is liable in sum equal to value of service rendered and mate-

rial furnished, and party rendering service and furnishing material may recover such sum in suit on quantum meruit. 23 App. 236 (2) (98 S. E. 188).

Sales: See § 4121 and notes.

Value: Where service rendered under an indivisible contract is received and is of benefit to party receiving it, person rendering same must prove value thereof and the other party may prove anything in proper reduction thereof. 23 App. 236 (2) (98 S. E. 188).

§ 4229. (§ 3644.) **Apportionment.**

Cited. 17 App. 550, 552, 553 (87 S. E. 831).

§ 4230. (§ 3645.) **Assent is essential to contract.**

Agent: Where one submits to another a contract of employment, whereby former agrees to ship goods to other as his salesman on commission, with stipulation that latter is to guarantee purchase-price of goods shipped, by giving to employer his note in amount of purchase-price thereof, and where agreement contains provision that it is made subject to approval of home office of employer, contract does not ordinarily become operative until condition as to acceptance has been complied with. 21 App. 45 (2) (93 S. E. 511).

Where, without notice of such formal acceptance, salesman and guarantor proceeds to order out goods under the contract, and the goods are shipped by employer as directed, and note covering and guaranteeing purchase-price is actually made and delivered, the contract of guaranty will be considered as complete and executed, and, upon suit on note so given, maker will not be permitted to avoid same by reason of employer's failure to furnish formal notice of acceptance under original contract. *Id.*

Where, at instance of agent and without practice of any fraud, owner of property, with actual knowledge that stipulations relating to mutual obligations arising out of contract of lease with tenant, enters his own indorsement upon contract as signed by agent and by him presented to owner for approval, stipulations referred to

become mutually binding upon both agent and owner as agreement arrived at by and between them. 23 App. 290 (2) (98 S. E. 224).

Bond: Where, at time of execution of written instrument constituting unilateral contract, whereby coal company was to furnish coal to city, bond referring to it as a "contract" was executed, and at subsequent time offer of promisor was accepted by other party, bond will be construed to guarantee performance of contract so completed, and subsequent failure to perform constitutes breach of the bond. 24 App. 732 (3) (102 S. E. 175).

Evidence here in dispossessory warrant proceeding did not authorize finding that new lease contract was made by the parties, but showed only mere promise to contract at future date. 24 App. 183 (100 S. E. 232).

Insurance: Posting of notice promising to insure cotton and announcing certain charge to cover insurance and other warehouse charges resulted in contract between warehouse company and such persons as had knowledge of notice and acted on it in storing cotton. 144/598 (1) (87 S. E. 804).

Patrons who stored cotton relying on custom of warehousemen in that municipality to insure to its full value cotton stored with them, can assert duty on part of warehousemen to so insure their cotton. *Id.* 598, 599 (2).

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Provision in receipt reading "Acts of Providence and fire excepted," did not constitute such express contract as excluded evidence of custom of warehousemen to insure for full value cotton stored, along with evidence that charge was made for insurance. *Id.* 598, 599 (5).

Landlord and tenant: Where farm had been rented for specified rent and paying for repairs, offer by tenant to take place at same price, and reply that landlord would rent at same rate without repairs, to which tenant did not reply, did not constitute renewal of tenancy, though tenant meantime had subrented. 145/160 (2) (88 S. E. 934).

Lease contract: Where renting agent, acting for owner of property, enters into contract of lease with tenant, he may not engraft thereon, without consent of owner, stipulations relating to mutual obligations arising out of contract between agent and owner, so as to bind latter. 23 App. 290 (1) (98 S. E. 224).

Mutual assent: It is essential to validity of contract that minds of contracting parties meet at same time, on same subject-matter, in same sense. 15 App. 831 (1) (84 S. E. 323).

Instrument in writing purporting to be bilateral contract, wherein only one of the parties promises to perform, there being no obligation on part of other party, lacks mutuality and is nudum pactum. 24 App. 732 (1) (102 S. E. 175).

Where coal company agrees to furnish coal to city and such agreement lacks mutuality, promise may be regarded as offer to contract, and when accepted before withdrawal becomes binding contract, and failure afterward to perform the promise is a breach thereof. 24 App. 732 (2) (102 S. E. 175).

If seller elects to assent to and acquiesce in change, modification, or counter proposition, contract as so altered becomes binding in its entirety on each of parties thereto, as their minds have met and assented to same thing in same sense. 24 App. 504, 505 (2) (101 S. E. 393).

Offer and acceptance: Although a continuing offer may be withdrawn before acceptance, if it is accepted before it is withdrawn or terminates, a contract results. 141/117 (1-a) (80 S. E. 559).

An accepted offer to purchase, accompanied by a check in part payment, the balance "to be paid in 90 days, if titles are clear," was a conditional and not an absolute agreement, which the vendor could repudiate. 141/418 (81 S. E. 203).

Paper executed by buyer here construed and held not an acceptance of the terms of original offer to sell cotton. 141/713 (1) (82 S. E. 29).

Paper reciting that certain person sold certain amount of cotton to another, being without consideration, and hence mere offer to sell, could be withdrawn before acceptance. *Id.*

Paper here construed and held not acceptance of offer to sell certain amount of cotton, where it stated entirely different kind of contract. *Id.*

Offer to sell and deliver five bales of cotton during September and 10 bales during October is not accepted by demands for delivery of five bales on September 4th and 10 bales on October 2nd. *Id.* 713, 714 (3).

Where agent takes order for personal property subject to approval of his principal, no sale is completed until the principal approves the order, though the agent has accepted part payment of the price, unless such payment has been paid to, and accepted by, the principal with knowledge of the terms of the order. 13 App. 485 (1) (79 S. E. 376).

Offer must be accepted unequivocally and without variance to constitute completed contract. 15 App. 210 (1) (82 S. E. 812).

Where one having right to accept or reject transaction takes and retains benefits thereunder, he becomes bound thereby. 15 App. 772 (1) (84 S. E. 157).

In order to make contract parties must assent to same terms. 145/160 (2) (88 S. E. 934).

Where instrument does not express absolute and present guaranty, but its import is merely to carry an offer or

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proposal of such a guaranty, contract is not complete until minds of parties have met by acceptance of offer. 20 App. 429 (1) (93 S. E. 106).

Fact that buyer of fertilizer material had sold his factory and discontinued its business, which fact was communicated to seller, raised no legal obligation on part of seller to accept buyer's transfer of contract to its successor. 20 App. 660, 662 (8) (93 S. E. 532).

Where letters written by defendant company and its agent to plaintiff did not constitute an absolute, unconditional, and unequivocal acceptance of his offer to buy from defendant certain goods of agreed value, more than \$50, there was no valid and enforceable contract between the parties. 21 App. 114 (1) (93 S. E. 1023).

Buyer's petition showing that seller's offer was accepted by buyer, unequivocally, unconditionally, and without variance, and mutual assent of parties to same thing in same cause, was sufficient as against general demurrer to allege binding and valid contract of sale. 24 App. 630 (1) (101 S. E. 692).

Option: Where two parties contract upon a consideration that an option given or offer made shall remain open and subject to acceptance until a stated time, there is binding contract to that effect; but mere proposition or offer, based on no consideration, though continuing in character, may be withdrawn before actual acceptance by other party. 141/117 (1) (80 S. E. 559).

Where lease contains provision that lessee, its successors, and assigns are to have use of timber upon lands leased, including right to cut and remove same within seven years, after which time lease may be extended by payment of 25 cents per acre per year, it is essential to right of lessee or its assigns that option should be exercised before expiration of term stated in lease or immediately after its expiration, and that amount stipulated as consideration for continuance of lease should be paid. 147/567 (94 S. E. 1008).

Where by terms of option contract optionor obligates himself to sell described lands upon payment of purchase price on day fixed, optionee, in order to raise binding promise on part of optionor to sell, must make his election and offer to perform within time stipulated in option contract. 149/147 (99 S. E. 301).

Order: Evidence in action for goods shipped pursuant to written contract held insufficient to raise issue that countermand of order was received by plaintiffs before contract was completed by acceptance of order. 144/581 (1) (87 S. E. 770).

Person to whom order for goods is sent may, by his conduct, lull proposed buyer into belief that order will be filled, and thereby estop himself from denying existence of valid and binding contract. 21 App. 114 (2) (93 S. E. 1023).

Acceptance of order for goods is not shown by allegation in petition that defendant "ordered out" a certain part of the goods "during the time specified in said order." 23 App. 163 (98 S. E. 114).

Where order for purchase of goods is signed by contemplating purchaser, and contains stipulations intended to become binding upon purchaser, but makes express provision that it is given subject to approval by person to whom addressed, order does not become binding as contract until approved and accepted by contemplated vendor. 23 App. 639 (1) (99 S. E. 138).

In action against manufacturer for breach of dealer's agreement to sell automobiles, under pleading and evidence, refusal of requested charge that dealer's letters to manufacturer in automobiles, under pleadings and evidence, refusal of requested charge that cars set out in dealer's agreement so that manufacturer was not thereafter bound to make additional shipments, unless it accepted dealer's additional orders, was error. 24 App. 633, 634 (7) (101 S. E. 693).

Ratification: Where terms of purchase as executed by buyer are varied, seller is privileged to repudiate contract in its entirety, but ratification of part

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of executed contract so varied is ratification of the whole, and contract as so altered becomes binding in its entirety upon each of the parties. 21 App. 160 (2) (93 S. E. 1018).

Signature: Contract giving defendants the use of certain land for a pumping station, the owner of the land to operate said pump during his lifetime, at his death his wife and daughter to operate it, also for use of water free of charge on his premises from water tank, was void as to the wife and daughter, where they did not sign it. 141/219 (80 S. E. 716).

Where contract is signed by seller, but not by buyer, but latter afterwards makes and signs entry on contract that he has received part of cotton bought, contract is thereby made binding on both parties. 144/392 (1) (87 S. E. 387).

Contract signed by one party only, but accepted and acted on by other, may be just as binding as if signed by both, if obligations are mutual. 14 App. 490 (1) (81 S. E. 362).

Terms of contract of sale of personal property may be embodied in note, and will be binding upon both parties after note has been delivered and accepted, and property delivered in pursuance of contract, notwithstanding paper was not signed by payee. 145/200 (2) (88 S. E. 954); 18 App. 179 (89 S. E. 79).

If plaintiff declares on written contract as signed by defendant, he may, if other necessary facts be proved, recover on proof that contract was signed by another, if not disqualified by law from acting for defendant in so signing, in presence of defendant, and at his instance, direction, or request, or with his consent. 145/836 (1) (90 S. E. 61).

Unilateral contract to buy becomes binding when acted on by both parties; writings not signed by the sellers, being mere offers to buy, are not enforceable, standing alone. 142/429 (1) (83 S. E. 207).

Written contract for sale of 100 bales of cotton to be delivered in future, in consideration of one dollar, was not unilateral. 144/33 (3) (86 S. E. 242).

Contract for purchase and sale of rock here was not unilateral. 144/75 (1) (86 S. E. 216).

Where plaintiff did not assume obligation to sell stock which he contended defendant had bound himself to buy, the contract was unilateral. 13 App. 236 (2) (79 S. E. 39).

Contract is not unilateral where it is signed by both parties, recites part payment and shows on one part agreement to sell described property, and on other part agreement to pay specified price therefor. 14 App. 515 (1) (81 S. E. 593).

Contract for sale of cotton, accepted by buyers, was mutually binding and complete. 16 App. 446 (1) (85 S. E. 606).

Where it is possible to construe contract as binding on both parties, it is not unilateral. 16 App. 636, 637 (2) (85 S. E. 943).

Contract whereby owner agreed to pay commission to real estate agents if his property should be sold by himself, by agents, or by anyone else, was unilateral and unenforceable where agents did nothing in respect to making sale. 17 App. 677 (1) (87 S. E. 1099).

Where lease at specified annual rental contained privilege to lessee to purchase property during term at such amount as might be offered by another, option was supported by general consideration for entire contract, and was not unenforceable on ground that it was unilateral. 145/312 (3) (89 S. E. 214).

If contract of sale signed by authorized agent of seller was so signed by the buyer as to be binding upon it, though only consideration arose from mutual obligations between the parties, contract would not be unilateral. 145/836, 837 (9) (90 S. E. 61).

Written order for automobile, signed by would-be purchaser, stipulating that car is to be delivered between certain dates, but in which proposed seller's liability for failure to deliver car is limited to mere repayment of such part of purchase price as is paid as cash deposit, is so lacking in mutuality as to be unenforceable. 18 App. 22 (88 S. E. 717).

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Assumption and payment of liabilities of bank furnish sufficient consideration for obligation, entered into by directors, to hold trust company harmless, and contract was not unilateral. 22 App. 348 (1) (95 S. E. 1025).

Where alleged purchasers under a contract of sale did not assume any obligation on their part to accept or to pay for goods which they contended defendant seller had bound himself to deliver, contract was unilateral, and

therefore unenforceable. 23 App. 565 (99 S. E. 56).

If traveling salesman, who has no authority to close sale, takes from prospective purchaser written contract agreeing to buy article on named terms and conditions, but by stipulations in writing contract is subject to approval of agent's principal, writing amounts to mere offer, and is unilateral, until approval contemplated has been duly made. 24 App. 765 (1) (102 S. E. 185).

§ 4231. (§ 3646.) Contracts by letter.

Acceptance: Where one writes to commission house that he has peaches for sale which he expects to net him certain price per crate, "and would be glad to negotiate further with you," and commission house telegraphs agreeing to "accept your offer," it constitutes no contract binding writer to sell at price mentioned. 15 App. 57 (82 S. E. 631).

In order for contract of purchase to become effective when entered into by correspondence through the mails, the offer to buy must be accepted by the seller unequivocally, unconditionally and without variance of any sort, so that minds of parties shall meet and assent to same thing in same sense. 21 App. 160 (1, 2) (93 S. E. 1018).

While contract can be made by correspondence through mail, or by telegram, offer of seller must be accepted by purchaser unequivocally, unconditionally, and without variance of any sort; there must be mutual assent of parties, and they must assent to same thing in same sense. 23 App. 398 (2) (98 S. E. 358).

Where holder of fire insurance policy receives from insurer letter notifying him that policy has expired, but that it has been renewed on certain conditions stated, and he fails to answer letter, or to comply with conditions stated therein, or to notify insurer that he has unconditionally accepted policy, before property has been destroyed by fire, there is no completed contract of insurance. 23 App. 398 (3) (98 S. E. 358).

Although, in order for contract of purchase to become effective when entered into by correspondence through the mails, offer to buy must be accepted by seller unequivocally, unconditionally, and without variance of any sort, if there be slight variance between acceptance and offer, shipment by seller of portion of goods ordered, which are accepted and paid for, would amount to ratification of terms of offer to buy, since ratification of part is ratification of the whole. 23 App. 675 (1-a) (99 S. E. 308).

Contract may be closed by letter or telegram and become binding, but if it is claimed that seller has become bound by acceptance of his offer by buyer, it must appear that offer was accepted unconditionally and without variance. 24 App. 11 (1) (99 S. E. 542).

When petition alleged that by telegrams and letters defendant contracted to sell engine to plaintiff for certain sum, general demurrer because plaintiff waited unreasonable time in accepting offer of sale in letter of April 22, 1918, which was mailed at Augusta, Ga., to Jacksonville, Fla., and answered by wire dated April 24th, was properly overruled, as under petition it was for jury to say whether answer was within reasonable time. 24 App. 304 (100 S. E. 719).

While contract may be made by telegrams, those between broker, offering to buy flour for plaintiff, and defendant's telegrams, offering to sell on different terms, did not constitute complete contract between plaintiff and

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defendant, where defendant's offer was not accepted unequivocally, unconditionally, and without variance, and where there was no mutual assent of parties to same thing in same sense. 24 App. 623 (102 S. E. 31).

Demurrer: Ground of demurrer that correspondence between parties to suit, relative to sale of cotton, was too vague and indefinite to base contract of purchase and sale upon, was itself too vague and indefinite to be considered by reviewing court. 23 App. 675, 676 (3) (99 S. E. 308).

Mutuality: Agreement to buy stock if it did not pay holder certain dividends was not void for want of mutuality, where by contemporaneous contract holder accepted stock as

part of price of property sold by him to writer. 15 App. 622 (1) (83 S. E. 1101).

Received: Evidence that letter was mailed to given person does not authorize presumption that he received it, unless evidence shows also that letter was properly addressed and duly stamped. 18 App. 413 (1) (89 S. E. 490).

Sales: Letter here was not on its face a direct offer to sell property for amount named therein. 140/74 (1) (78 S. E. 410).

Telegram, which, in connection with other correspondence in case, tended to show valid contract made between plaintiff and defendant, was admissible. 19 App. 21 (3) (90 S. E. 1037).

CHAPTER 2.

Of the Parties.

§ 4233. (§ 3648.) Infant, when bound.

Stated. 148/1, 16 (95 S. E. 698).

Charge of this section in effect was appropriate here in view of testimony and deductions authorized thereby. 21 App. 522, 523 (94 S. E. 826).

Necessaries:

Jury: What are necessities for infant under 21 years of age is question for jury, according to circumstances and conditions in life of such infant. 17 App. 361 (1) (86 S. E. 938).

Note: Plea of minority in suit on note sets up valid defense without negating that it was for necessities. 17 App. 730 (88 S. E. 407).

Personalty: Where minor purchases personal property, and in part payment turns over certain other property and executes note for remainder of price, he can not, in suit brought on note after his majority, dispute its validity on ground of his minority when note was executed, where it appears that he still retains possession of property, although it be shown that he offered and still offers to return property on condition that other property given by him to seller in part payment should

first be surrendered. 22 App. 192 (95 S. E. 734).

Ratification: Beneficiaries here in action to foreclose mortgage to estate were not entitled to recover attorney's fees and expenses where their legal right thereto had been superseded by contract with mortgagor, though one beneficiary was minor when he signed contract, where, when he became of age, the contract had been acted upon, decree rendered, and payments made on it, and beneficiaries had procured issuance of execution since his arrival at age. 141/727, 729 (6) (82 S. E. 451).

Repudiation: Contract of infant, except for necessities, being voidable, may be repudiated by him either during minority or within reasonable time thereafter. 22 App. 192 (95 S. E. 734).

Under this section no attempted repudiation of liability under voidable contract can be effective unless accompanied by surrender of property acquired which may still remain in infant's hands. 22 App. 192 (95 S. E. 734).

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Year's support: Agreement between widow and children that land set apart for year's support be sold and certain money be paid to each child was bind-

ing on minor son where he ratified same after attaining majority. 148/157 (96 S. E. 178).

§ 4234. (§ 3649.) **Infancy a personal exemption.**

Charge of this section in effect was appropriate here in view of testimony and deductions authorized thereby. 21 App. 522, 523 (94 S. E. 826).

Evidence here authorized finding against plea of minority. 21 App. 522 (1) (94 S. E. 826).

§ 4235. (§ 3650.) **Infant doing business bound.**

Cited. 20 App. 802, 803 (93 S. E. 538).

Business does not include occupation of minor as laborer. 13 App. 117 (78 S. E. 864).

Charge of this section in effect was appropriate here in view of testimony and deductions authorized thereby. 21 App. 522, 523 (94 S. E. 826).

Farming: Verdict for plaintiff in action against minor on contract could not be disturbed, where there was evidence that defendant was farming as adult with father's permission, that contract was connected with such business, and that consideration had not failed. 17 App. 754 (2) (88 S. E. 411).

Junk: Municipal ordinance it not invalid because it prohibits junk dealers, etc., from buying or receiving junk from minors under 18 years of age, and thus

interferes with right of minors to engage in business with consent of their parents. 148/1, 2 (5) (95 S. E. 698).

"Necessaries:" Mere showing that plaintiff furnished clothing to minor did not authorize recovery, when it also appeared that minor's father furnished him with all necessities suitable to his station in life. 13 App. 117 (78 S. E. 864).

Plea of minority in suit on note sets up valid defense without negating that infant was practicing profession or trade with permission of parent or guardian. 17 App. 730 (88 S. E. 407).

"Profession" does not include occupation of minor as laborer. 13 App. 117 (78 S. E. 864).

"Trade" does not include occupation of minor as laborer. 13 App. 117 (78 S. E. 864).

§ 4236. (§ 3651.) **Marriage contracts of infants.**

Cited. 149/707, 708 (102 S. E. 21).

§ 4237. (§ 3652.) **Contract of insane persons.**

Contract executed by one insane at time is invalid. 149/548 (1) (101 S. E. 124).

Entire loss: To avoid contract on account of mental incapacity, there must be entire loss of understanding. 19 App. 817 (1) (92 S. E. 285).

One who has not strength of mind and reason equal to a clear and full understanding of his act in making a contract is one who is afflicted with entire loss of understanding. 19 App. 817 (1-a) (92 S. E. 285).

Evidence: On trial of suit to cancel deed upon grounds of mental incapacity of grantor and of fraud and undue influence exercised by grantee, it

was competent to prove that subsequently to execution of deed grantor made will devising property covered by deed to persons other than grantee, as tending to illustrate state of grantor's mind and that she was in condition to be influenced. 148/238 (2) (96 S. E. 327).

Guardianship: After fact of insanity has been established by court of competent jurisdiction, and after affairs of insane person have been vested in guardian, power to contract, while such judgment and appointment remain of force, is gone, but where no guardian has been appointed and contract is made, validity thereof depends on

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whether or not contracting party was actually insane at time contract was entered into. 20 App. 498 (2) (93 S. E. 152).

Obligation: Person actually insane can not contract so as to bind himself or his personal representative merely by virtue of obligation imposed by the agreement; contracts on his behalf, in order to be binding as such, must be entered into by his guardian legally appointed after commission sued out. 23 App. 181 (1) (98 S. E. 94).

Personal representative: If one who is actually insane, but who has not been legally so adjudged, proceeds to execute a contract, agreement thus made, when taken by itself alone, while not absolutely void, becomes voidable at option of his personal representative upon such state of insanity being shown. 23 App. 181 (1) (98 S. E. 94).

Mere fact that other party to contract was ignorant that person with whom he was dealing was insane, or even that existence of insanity could not have been discovered by exercise of ordinary and reasonable prudence, will not of itself operate to prevent exercise of option of personal repre-

sentative to avoid the contract. 23 App. 181 (1) (98 S. E. 94).

Ratification: Contract of one insane at time of agreement, but who had never been legally so adjudged, ceases to be voidable and becomes valid and binding whenever it is shown that obligation has been subsequently ratified either by words or conduct of contracting party himself during lucid interval or by virtue of what amounts to confirmation by personal representative. 23 App. 181 (1) (98 S. E. 94).

Even where there has been no actual ratification of a contract executed by one insane at the time of the agreement, liability upon contract will be upheld where there had been no adjudication of insanity, and the opposite party was ignorant of the disability and had no reasonable cause to suspect it, and the contract was fair and reasonable, was entered into in good faith, without fraud or undue influence, and was founded upon valuable and adequate consideration, and the insane party actually received full benefit of the contract, and the parties can not be restored to the status quo. 23 App. 181 (1) (98 S. E. 94).

§ 4239. (§ 3654.) Contract of drunkard.

Knowledge: In absence of evidence that holder of promissory note either caused or knew of drunken condition of defendant at time he indorsed note, tes-

timony that such indorser was in fact intoxicated when he signed his name presented no defense to action on note. 18 App. 73 (2) (88 S. E. 918).

CHAPTER 3.

Of the Consideration.

§ 4241. (§ 3656.) Nudum pactum.

Cited. 13 App. 740, 742 (79 S. E. 484).

Burden of proof: Where notes sued on were unconditional contracts under seal and recited a consideration, the burden was upon defendant to prove that they were without consideration. 13 App. 153 (1) (78 S. E. 1024).

Charitable donations: Promises to donate money to a charitable purpose is gratuitous and unenforceable unless some consideration therefor exists; but a consideration is supplied where the

promisee, on the faith of the promise and before its withdrawal, expends money and incurs inforceable liabilities in furtherance of the enterprise. 140/291, 292 (3) (78 S. E. 1075).

Contract, to be valid, must be supported by consideration. 23 App. 569 (1) (99 S. E. 57).

Conveyance: Oral agreement between two persons to purchase land, whereby first is to pay for the land from the proceeds of a loan and take title in

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his own name, and convey to the second a half interest when reimbursed for the purchase-money from the rents and profits of such land, is deficient in mutuality and is a nude pact. 140/765 (1) (79 S. E. 852).

Credit: Contract of sale was not unenforceable because of failure to state whether sale was for cash or on credit, petition alleging that sale was made with reference to general custom to allow sixty days credit. 24 App. 630, 631 (3) (101 S. E. 692).

Debt of another: Where as part of consideration in sale of personalty to be delivered in future vendee promised to pay debt owed by vendor to third person, neither that person nor those claiming under him acquired equitable rights against vendee, beyond rights of vendor through whom they claimed. 145/730 (1) (89 S. E. 822).

Where as part of consideration in sale of personalty to be delivered in future vendee promised to pay debt owed by vendor to third person, promise did not contemplate payment of promissory note made by vendor to third person, and equitable action by assignee of such note against vendee to compel payment would not lie. 145/730, 731 (2) (89 S. E. 822).

Division of land: Oral agreement here between two persons, relative to division of land purchased and payment therefor, not void for want of consideration, though sale contract was void under statute of frauds. 143/379 (1) (85 S. E. 125).

Draft: Promise by bank cashier, made without consideration to drawer of draft, to pay same out of funds of customer on whom draft was drawn and who had been credited with proceeds of negotiable paper which he as owner transferred to bank, is not enforceable against the bank, unless customer assents that bank shall make such application of the funds. 23 App. 279, 280 (4) (98 S. E. 122).

Employment: Where employer's agreement, made during employment, to pay as bonus some indefinite share of profits contingent on continuous and satisfactory services, is supported by no consideration, it is not enforceable,

and is optional with employer. 16 App. 253 (1) (85 S. E. 203).

Any sum paid employee in excess of sum agreed on is mere gratuity when not based on new consideration. Id.

Where in contract of service it is stipulated that it may be terminated upon certain notice, verbal new agreement at lesser sum for service, which does not give right to employer to terminate contract upon notice, but provides definite and specific duty and fixes definite compensation and which is acted upon by both parties, payment being made and accepted thereunder, is not void for want of consideration. 22 App. 705 (1) (97 S. E. 106).

In suit against administrator for damages, petition, showing that no services were contemplated, but that all services had been rendered and fully paid for, and that statement of deceased to plaintiff that he was going to deed land to her as additional compensation for her services rendered during last fifteen years, was mere voluntary promise without any valid consideration to support it, and therefore not enforceable, was demurrable. 24 App. 541 (101 S. E. 709).

Estate: Allegation of surrender by plaintiff to widow of decedent of his equitable right, in estate of decedent held sufficient allegation of consideration to support contract by her to convey land to plaintiff at her death, so that contract after performance by former was enforceable. 147/50, 51 (2) (92 S. E. 872).

Evidence: It was not error to exclude testimony of defendant in which he endeavored to explain his good faith in failing to pay account for goods furnished to third person upon his promise to pay for same, where it appeared that such promise related to a date subsequent to that of the sale. 19 App. 156 (4) (91 S. E. 239).

Face of contract: Where contract recites a consideration, it will not be cancelled on ground that it was void for want of consideration. 140/611, 612 (2) (79 S. E. 533).

Insurance: It is immaterial that insurance company procured sister of insured to sign "release" of policy, where the sum expressed as considera-

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tion for such release was in fact amount which had already been paid as sick benefit under the policy, there being no real consideration for such release. 18 App. 494, 495 (4) (89 S. E. 633).

Jury: It was for jury to determine whether consideration of notes sued upon was exclusive right of defendant to sell patented article in certain territory, or whether it was an interest in plaintiff's house and lot, there being evidence to support contention that it was the latter. 18 App. 161, 162 (4) (89 S. E. 77).

Modify: Exclusion of subsequent contract modifying that sued on was proper, where there was no evidence of any valuable consideration therefor. 142/524 (2) (83 S. E. 115).

New agreement: Amendment to answer setting up subsequent agreement with purchaser was properly stricken where it did not show any consideration for such subsequent agreement. 142/836 (3) (83 S. E. 958); 17 App. 575 (2) (87 S. E. 842).

Note: Negotiable note purporting to be given for "value received" is prima facie presumed to be founded on full legal consideration. 15 App. 103 (1) (82 S. E. 636).

Plea which admitted rendition of part of services for which note was given, and cash consideration paid, failed to show entire want of consideration for note, and was properly stricken. 16 App. 297 (85 S. E. 205).

Where note recited that it was given for certain shares of stock, with guaranty of certain annual dividend, breach of guaranties made by corporation which was not an original party, will not establish defense of want of consideration, unless corporation owned such note when made, and subsequently transferred same to plaintiff. 145/494 (2) (89 S. E. 613).

Where note was, after maturity, transferred by payee to another, plea by makers, in suit thereon, that it was without consideration and was given at payee's request that they lend it to him to be used by him "to borrow money upon," he stating to them that at maturity he would return it to them without liability on

their part, was erroneously stricken, it appearing that the note matured on November 15, 1915, and was transferred on September 25, 1917. 22 App. 88 (95 S. E. 377).

Where, in action on note, secretary of plaintiff corporation testified that the note was not given in liquidation or settlement of any account or for value received at time given, that value had been in part received, that it was given to secure part of an old account and a future account still to be made, that the note was not in whole for what defendant had bought or what he was going to buy, that the note did not show what defendant bought or what he owed, court did not err in refusing to direct verdict for defendant, or in refusing to dismiss suit, or in directing verdict for plaintiff. 22 App. 297 (2) (95 S. E. 998).

In action on promissory notes, plea of parol contract to furnish defendant bare living expenses in consideration of his services as real estate agent, that profits were to be divided equally, that after services without profits it was terminated by mutual consent, that notes in suit were executed to preserve record of advancements for living expenses, and were without consideration, was sufficient to have permitted defendant to submit to court the question of consideration. 24 App. 208 (100 S. E. 650).

Plea in action on note that defendant received nothing, and that plaintiff parted with nothing, in consideration of note being signed, seeks not to destroy promise, but to avoid consequence thereof, because it was nudum pactum. 24 App. 611 (1) (101 S. E. 716).

Parol evidence, though inadmissible to vary written contracts, is admissible to show that contract never had any legal existence. 14 App. 661 (3) (82 S. E. 161).

Past consideration: Exception to rule that past consideration will not support subsequent promise is recognized where subsequent promise is one which, under facts surrounding it, would be implied by law. 17 App. 502 (2) (87 S. E. 718).

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Plea: In action on contract providing for transfer of option, and containing ambiguous provision that transferee should pay transferor a certain per cent. of the purchase of the land "for services previously rendered to this date," error to strike plea that no services were rendered by plaintiff, and that therefore promise to pay was without consideration. 13 App. 396 (79 S. E. 243).

Plea here was sufficient plea of want of consideration for note sued on as against general demurrer. 16 App. 436 (1) (85 S. E. 625).

Plea in suit on note that the note is void, because defendant had not received anything from company for which the note was given, and that he has no recollection of signing said note, but that if he did sign same that there was a mistake on his part, as he did not at that time nor up to the present time owe the company anything, and that therefore the same is a naked promise and of no value, as there was no consideration moving to defendant for which said note could have been given for as a plea of want of consideration, was good as against general demurrer. 21 App. 170 (1) (94 S. E. 81).

Pleading: Ordinarily, in suit on executory simple contract, consideration must be alleged, and it is not sufficient to allege generally that there is a consideration, or a valuable consideration, but the consideration must be alleged with reasonable explicitness. 145/461, 470 (80 S. E. 581).

Receipt: If one having several different demands against another accepts payment of one or more and gives receipt, there being at time no mention of other demands, mere recital in receipt that it is in full payment of all claims is without consideration so far as relates to unsettled note signed by party making payment and another not mentioned or in minds of parties at time, and signing of receipt does not estop holder of unsettled demand from asserting such demand, nor does signing of receipt render it incumbent upon holder to refund money received upon settlement as to disputed claims. 24 App. 277 (1) (100 S. E. 719).

Reconveyance: Where after sale of personal property vendor agrees to take it back and in pursuance of such agreement receives such property from vendee, agreement having been executed, vendor can not thereafter claim that it was invalid for want of consideration. 146/245 (3) (91 S. E. 32).

Release: Subsequent release to executed contract is in itself a contract, and plea setting up such a defense must show that the release relied on was founded upon a consideration. 21 App. 622 (2) (94 S. E. 915).

Renewal note: It is good defense to note in renewal of one given to procure loan that no money was procured and that renewal was given on false assurance that payee had check for maker. 144/850 (88 S. E. 195).

Seal: Contract nudum pactum is no more enforceable when under seal then when not under seal, as against timely defense and proof thereof. 23 App. 569 (1) (99 S. E. 57).

Settlement: Where plaintiff's pending suit against defendant was settled between parties and marked settled on defendant's payment of money and delivery of stock, in full settlement of claims, it did not operate as settlement of note signed by defendant and another, not mentioned at settlement. 24 App. 277 (2) (100 S. E. 719).

Surety: Agreement by creditor with principal debtor, made after debt has become due and without surety's consent, to forbear collection of debt for definite period, if without consideration, does not discharge surety; promise by principal debtor to pay interest upon debt during time of forbearance forms no consideration for such forbearance, when debtor is already bound pay such interest. 22 App. 235, 236 (1) (95 S. E. 717).

Unilateral: Instrument in writing purporting to be bilateral contract, wherein only one of the parties promises to perform, there being no obligation on part of other party, lacks mutuality and is nudum pactum. 24 App. 732 (1) (102 S. E. 175).

Worthless: Where article sold is wholly worthless, the seller can not collect the purchase price. 13 App. 772, 774 80 S. E. 32).

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§ 4242. (§ 3657.) **Valid consideration.**

Stated. 142/12 (82 S. E. 225).

Benefit given to or obtained by maker or principal on his transfer of note with his indorsement supplies consideration sufficient to bind surety. 19 App. 118 (2-a) (91 S. E. 287).

Charities: It is not necessary to validity of promise to donate to a charitable purpose that promisor should receive personal benefit or consideration, where there is some consideration for the promise. 24 App. 388 (1) (100 S. E. 784).

Debt: Surrender and satisfaction of existing debt, if bona fide, operates as present consideration. 144/587, 588 (5) (87 S. E. 799); 20 App. 117 (2) (92 S. E. 771)

Donation: In suit by university on promise to donate money, wherein de-

fendant admitted prima facie case in favor of plaintiff and set up want of consideration, his evidence showing merely that he received no personal benefit or consideration did not establish his affirmative defense. 24 App. 388 (2) (100 S. E. 784).

Motive of contract: Motive with which a party enters into a contract is no part of its consideration. 147/185 (4) (93 S. E. 293); 148/651 (1) (98 S. E. 79).

Renewal of note: Promise by maker and endorser of notes, made before notes were due, to pay them if the time for payment were extended, did not form consideration for extension, maker and endorser being already bound to pay them. 19 App. 810, 811 (2) (92 S. E. 298).

§ 4243. (§ 3658.) **Good and valuable considerations.**

Attorneys: Note given for professional services is not nudum pactum merely because payees named therein, attorneys at law, were bound (having been appointed by court) to defend without compensation maker's brother in criminal prosecution for murder; and this is true notwithstanding appointment was unknown to makers at time they

executed note. 24 App. 452 (1-a) (101 S. E. 131).

Credit: Amount which by agreement was to be allowed for article sold, as credit on price of another article to be purchased by plaintiff, furnished sufficient consideration. 17 App. 409 (87 S. E. 149).

§ 4244. (§ 3659.) **Inadequacy of consideration, effect of.**

Cited. 147/185, 190 (93 S. E. 293).

Charge that if an insolvent conveys property on which he owes balance of price, on sole consideration of payment of such balance, such conveyance

would be void as to other creditors and the vendor's equity be subject to his debt, was erroneous. 144/556 (4) (87 S. E. 778).

§ 4245. (§ 3660.) **Mistake.**

Knowledge: Mutual mistake of law is good defense against action to recover money, under contract of purchase, where there is full knowledge of all

the facts, provided the mistake be clearly proved and plaintiff can not in good conscience receive the money sued for. 140/217 (1) (78 S. E. 903).

§ 4246. (§ 3661.) **Mutual promises.**

Charities: If promise to donate money to charitable purpose is mutual subscription for common object, promise of others is good consideration for promise of each. 24 App. 388 (1) (100 S. E. 784).

Conveyances: Agreement to convey certain described real estate to vendee in

consideration of conveyance of certain other real estate by vendee is on such a valuable consideration as will support contract. 147/30 (5) (92 S. E. 636).

Mutually binding: Where mutual promises are relied on as consideration, obligations must be mutually binding

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on contracting parties. 17 App. 677 (1) (87 S. E. 1099).

Oral subscriptions are not within the meaning of this section. 140/291, 292 (3-a) (78 S. E. 1075).

Shares of stock: Contract for sale of stock, to be paid for out of dividends of additional moneys, at option of pur-

chaser, who agreed to such terms, was not wanting in mutuality. 147/185, 186 (6) (93 S. E. 293).

Written contract here held to contain mutual obligations which furnished valid consideration. 149/589, 590 (1) (101 S. E. 582).

§ 4247. (§ 3662.) **Considerations good in part and bad in part.**

Criminal prosecution: Note given in settlement of account, if criminal charges against one of makers would be dismissed or settled, was on illegal consideration, and is unenforceable. 145/507 (1) (89 S. E. 484).

Negotiable promissory note given in whole or in part upon agreement, express or implied, to settle or prevent criminal prosecution is void, unless

case falls within some express statute authorizing settlement. 22 App. 433 (1) (96 S. E. 269).

"Illegal:" Obligation supported by independent consideration will be enforced, though indirectly connected with illegal transaction, where plaintiff does not require aid of illegal transaction. 16 App. 7, 8 (2) (84 S. E. 222).

§ 4250. (§ 3665.) **Failure of consideration.**

Cited. 16 App. 436, 440 (85 S. E. 625).

Account: Where petition in suit as on an "account stated" not only fails to allege necessary promise to pay, but, by embodying written agreement relied on, shows within itself that no such promise was in fact made, demurrer to answer that articles furnished proved worthless, and pleading failure of consideration under the contract, was properly overruled. 21 App. 194, 195 (1) (94 S. E. 83).

Advances: Where consideration of obligation is not definitely ascertained at time of its execution, or consists of contingent liability or advances to be thereafter made, it is incumbent upon holder thereof to show amount thus actually advanced; this burden was met in present case. 21 App. 1 (2) (93 S. E. 499).

Burden of proof of failure of consideration is on defendant, who admits the due execution of a note and pleads total failure of consideration. 141/406 (81 S. E. 195)

Charge that plaintiff, if defendant had obtained property and left it, without some authority would have had no right to convert it to his own use, as his own property, and if he did that, he would be liable to defendant for

the value, was not erroneous. 21 App. 648 (1) (94 S. E. 832).

Conditions: In absence of showing by defendants of compliance with terms and conditions of express-warranty contract, entered into between them and sellers of property, they could not plead a failure of consideration, either partial or total. 19 App. 512, 514 (91 S. E. 1003).

Evidence of failure of consideration is admissible in action on note, to which payee had only equitable title. 144/233 (3) (86 S. E. 1093).

Evidence here in action on note held to warrant judgment for plaintiff showing no mistake or failure of consideration. 146/120 (3) (90 S. E. 857).

Exchange of property: Petition for damages for refusal to return mules delivered to defendant in exchange, and for cancellation of notes given by plaintiff, was not subject to general demurrer. 145/403 (89 S. E. 364).

False representations: Misrepresentations as to quality will not authorize abatement of price of personalty or land for partial failure of consideration. 142/22 (9) (82 S. E. 459).

Issue: Court did not err as against vendee suing for rescission of contract or abatement of purchase price because of fraud, in restricting issue to failure of consideration and abatement of pur-

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chase price. 149/396, 397 (3) (100 S. E. 379).

Land: When purchaser of real estate is not prevented by fraud on part of seller from inspecting it, and fails to exercise diligence in inspecting it, plea of failure of consideration on account of its physical condition or environment will not be entertained. 20 App. 123 (92 S. E. 893).

Where there is no fraud on part of vendor of real estate which prevents inspection thereof, and purchaser fails to exercise diligence by inspecting the property, plea of failure of consideration on account of its physical condition or environment will not be entertained. 21 App. 98 (1) (94 S. E. 264).

Machine: Defects in machinery purchased no defense to action on notes for purchase money, where written agreement between parties made at time of execution of notes provided that no complaint should be made by purchaser after being in possession of machinery thirty days, and he was in possession for such period under the contract, and it did not appear that he made any complaint during that time. 23 App. 426 (1) (98 S. E. 405).

Note: Maker of note given for mining stock, to sustain plea of failure of consideration, must show that payee acted in bad faith, that stock was worthless when note was given, and that payee knew this fact. 13 App. 23, 24 (78 S. E. 734).

Where defendant executed note to bank to obtain fund for particular purpose, which fund was deposited in name of third person as trustee, defendant was liable on note though money was withdrawn and misappropriated by trustee. 14 App. 270 (80 S. E. 511).

Plea which admitted rendition of part of services for which note was given, and cash consideration paid, failed to show entire want of consideration for note, and was properly stricken. 16 App. 297 (85 S. E. 205).

Where maker of note knew of defects in property for which it was given, he could not set up as defense failure of consideration based on such defects. 17 App. 579 (87 S. E. 836).

Plea here of failure of consideration merely charged that purchaser had notice of equities between original parties to note by virtue of memorandum on the note reciting that it was given for certain shares of stock, with guaranty of certain annual dividend. 145/494 (1) (89 S. E. 613).

Plea alleging that note was given for certain stock in corporation, and there being no attack on validity of stock or denial that it was received by maker, allegations that stock was worthless would not amount to allegation that note was nudum pactum. 146/282, 283 (5) (91 S. E. 88).

Fact that defendant in action on note brought by medical college lost dental supplies and equipment necessary to his profession by reason of fire which destroyed college buildings and which was said to be due to negligence of college officers, and that defendant was thereafter forced to follow faculty from building to building to finish the term, which was of very little benefit to him, did not show total failure of consideration. 19 App. 525 (91 S. E. 921).

It was not error to refuse to allow defendant in action on several promissory notes to amend his pleadings by adding plea alleging that after death of payee of notes (which were for purchase price of land) "a man by the name of Walker," "representing the estate of the decedent," or "appearing to represent" the decedent, obtained from defendant a mortgage to secure one of the notes, under agreement that he would carry out agreement of decedent to build house on land, and failed to do so, and that "the consideration for said transaction has wholly failed." 20 App. 88 (5) (92 S. E. 545).

Plea in action on note alleging that defendant, after having taken course of instruction in pharmacy, believing that he was attending a certain medical college, "a chartered institution authorized by law, and recognized in the medical and pharmaceutical profession, and the medical boards established by law, to be first class, and that its diploma would be given recognition without further examination," was in-

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formed that he would be given diploma on payment of amount of note sued on, and he made the note to the plaintiff, that he afterwards discovered that said college had ceased to exist before issuance of diploma, that diploma was without value, and that consideration for note had failed, etc., set forth no legal defense. 20 App. 205 (1) (92 S. E. 955).

Plea of failure of consideration was supported by evidence, from which it appeared that consideration of note sued on was certain number of shares of stock, never delivered, and that contract between original parties to note was rescinded. 20 App. 570 (93 S. E. 221).

Where, by agreement with payee in note, endorser was to be paid a consideration of a certain per cent. on all merchandise sold to the maker, mere fact that such per cent. was never paid did not invalidate contract and relieve endorser from liability. 23 App. 609 (99 S. E. 222).

Plea in action on note that defendant bargained certain property to S., receiving from him money and his notes, delivering to him bond for title, that she pledge such notes, that in accordance with subsequent agreement, under which S. was to surrender bond for title and house, she executed and delivered note upon which suit was based, that S. never surrendered such bond, that she had been unable to dispose of the property with the bond outstanding, that the consideration of the note sued on had totally failed and that plaintiff knew of such facts at time he received the note, was not subject to demurrer. 23 App. 663 (2) (99 S. E. 224).

Failure of executory consideration in promissory note is not defense against purchaser for value before maturity who had knowledge of character of consideration but who acquired note before consideration had actually failed, and who had no notice, constructive or otherwise, that consideration would fail. 24 App. 298 (100 S. E. 647).

Maker of promissory note which recites that its consideration is purchase price of described personal property,

but does not purport to integrate the sale contract, may, in defense to suit on note by seller, plead as failure of consideration a breach of a contemporaneous oral-warranty. 24 App. 729 (102 S. E. 170).

Partial failure: Where, in action for material and labor used in roof, defendant files plea of total failure of consideration, and there is no data from which jury may reduce price in proportion to partial failure of consideration, plea must be supported by showing that roof was entirely worthless, and verdict must be either for full amount claimed or general verdict for defendant. 17 App. 523 (2) (87 S. E. 825).

While plea of total failure of consideration includes plea of partial failure of consideration, yet when jury are not given data from which they could reduce full amount of contract price, charge on partial failure of consideration would be unauthorized. 20 App. 474 (5) (93 S. E. 155).

Defendant in action on promissory note, between original parties to contract, may plead partial failure of consideration upon which contract was founded. 20 App. 740 (1) (93 S. E. 232).

Where defense to suit is based solely upon partial failure of consideration, before verdict can legally be rendered giving defendant benefit of such partial failure he must show extent to which consideration failed; jury must have sufficient data, presented by the evidence, upon which to base verdict in such a case. 21 App. 665 (2) (94 S. E. 821).

Plea: Mere allegation that note is wholly without consideration, and therefore null and void and unenforceable, amounts to nothing more than plea of general issue, and is too vague and indefinite to constitute proper plea of failure of consideration. 18 App. 45 (2) (88 S. E. 825).

Plea in affidavit of illegality in proceeding to foreclose chattel mortgage securing note that one of the mules delivered to vendee was returned to the vendors who accepted said mule, took possession of him, and that in a few days he died in their possession,

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and asserting that there was a total failure of consideration in so far as value of said mule was concerned was a good plea of rescission, and fact that pleader denominated it as plea of failure of consideration did not defeat the plea nor its effect. 23 App. 393 (98 S. E. 365).

Recoupment: Fact that purchaser afterwards gave notes for remainder of purchase price then unpaid would not prevent him from setting up, by way of recoupment, claim for damages based on alleged deficiency in weights of diamonds purchased, since damages arose out of original contract of purchase. 19 App. 125 (2) (91 S. E. 214).

Remedy defects: Where notice of defects had been given or waived, buyer could defend for failure of consideration, if seller failed, after reasonable time, to send competent man to put machine in order. 16 App. 457 (2) (85 S. E. 613).

If seller had sent man to put machine in order and he failed to make it work well as stipulated in contract, buyer must show this, and that he immediately returned machine, in order to complete failure to consideration. *Id.*

Rescission: Court having charged that plaintiff could not recover if consideration of contract had failed, no injury was occasioned to defendant by failure to charge law of rescission. 20 App. 270 (92 S. E. 1009).

Restoration: That buyer had not returned machine did not preclude him from setting up failure of consideration. 16 App. 457 (2) (85 S. E. 613).

Failure of buyer to return or offer to return machine was such failure to comply with his contract to immediately return it as precluded him from setting up failure of consideration. *Id.*

Seal: It is good defense to action on negotiable promissory note, under seal, in hands of original payee, that it was executed without any lawful consideration. 19 App. 493 (1) (91 S. E. 792).

Where only consideration expressed in note is "value received," inquiry into consideration, and proof of what consideration in fact was, does not have effect of varying an uncondi-

tional contract in writing; either want or failure of consideration may be shown in defense to suit on such a note, though note be under seal. 22 App. 210 (1) (95 S. E. 718).

Shortage: Defense filed to action on note that for some time prior to execution of note defendant had been buying cottonseed for plaintiff, who claimed that defendant had not shipped all purchased, that note was given for alleged shortage, that defendant had delivered all seed purchased for plaintiff, and that note was wholly without consideration and totally void, was not subject to general demurrer. 19 App. 493 (2) (91 S. E. 792).

Total failure: Evidence here in action for price of bank fixtures did not show total failure of consideration, though the fixtures were not as ordered, where they were installed and used until trial. 141/376 (1) (81 S. E. 127).

Plea of failure of consideration was unsupported by evidence, where uncontradicted evidence showed that consideration included matters presumably of value to maker. 16 App. 608 (2) (85 S. E. 934).

Where purchaser of automobile inspected it before purchase, made cash payment, gave promissory note for balance of price, and received the property, and four months thereafter made payment on the note, and after maturity of note wrote to payee promising payment, he could not, when sued on the note, successfully set up defense that there had been total failure of consideration. 19 App. 454 (91 S. E. 910).

Warranty: Plea of failure of consideration in action on purchase-money note stipulating that horse was not warranted as sound, because horse was not sound, was properly stricken. 142/836 (1) (83 S. E. 958); 17 App. 575 (1) (87 S. E. 842).

Failure of consideration was not available as defense to note given for price of horse, where warranties were waived. 16 App. 39 (2) (84 S. E. 490).

Doctrine of failure of consideration is necessarily included in instruction by court covering questions of express warranty and implied warranty and

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fraud and deceit. 24 App. 468, 469 (3) (101 S. E. 399).

Worthless: Striking of plea in action on notes given for purchase price of tractor-engine alleging that plaintiff had promised that he would remedy trouble, and that in reliance on such

promise defendant had given the notes, and that the engine was wholly worthless and not suited for purposes for which it was bought, etc., was error. 21 App. 717 (94 S. E. 901); 23 App. 791 (99 S. E. 541).

CHAPTER 4.

Of Illegal and Void Contracts.

§ 4251. (§ 3666.) Void contracts.

Baseball: Release by baseball club to another club of services of ball player under contract with it, in consideration of certain sum of money, is not illegal as being opposed to public policy, nor as amounting to contract for involuntary servitude of player. 147/201 (93 S. E. 208).

Burden of proof is on party setting up illegality of contract apparently legal on its face to show that contract is illegal. 14 App. 344 (1) (80 S. E. 731).

Constitution: Where contractor constructed and installed light and water plant in pursuance of executory conditional contract of sale, and delivered physical possession to municipality, right of action to recover property or to enforce payment of contract price by city was necessarily dependent upon agreement by which title was reserved in him; and that agreement, being contrary to constitution, was illegal and not enforceable in law or equity. 149/431 (3) (100 S. E. 362).

Criminal prosecution: Negotiable promissory note given in whole or in part upon agreement, express or implied, to settle or prevent criminal prosecution is void, unless case falls within some express statute authorizing settlement. 22 App. 433 (1) (96 S. E. 269).

Executory contract: Prohibited contract, if executed will be left to stand, but, if executory, neither party can enforce it. 15 App. 555 (1) (83 S. E. 967).

In pari delicto: Where parties are engaged in illegal transactions, whether *malum prohibitum* or *malum in se*,

courts will not grant relief; in such cases rule is for court to leave parties where it finds them, no matter whether illegality of contract appears from plaintiff's case or is set up by way of defense. 21 App. 448 (94 S. E. 644).

Intoxicating liquor: Contract under which brewing company advanced money to buy license for "near beer" saloon, was unenforceable, where consideration was that licensee should handle such company's beer exclusively, and such beer was intoxicating and handling same was violation of Penal Code, section 426. 17 App. 383 (87 S. E. 159).

In suit by indorsee of note held as collateral security for open account due by indorser to indorsee, amendment to plea which alleged that open account was for intoxicating liquors purchased by defendant from plaintiff, resident of another state, and that laws of Georgia prohibited sales of liquor in this State, but did not allege that sale was in this State, and petition did not show that sale was in this State, there was no error in disallowing amendment upon objection that it failed to show place of contract of sale. 146/634 (1) (92 S. E. 56).

It was error to exclude bottles of "Maritana," together with caps and labels thereon, introduced in evidence by defendant, where labels contained statement, "Contents 12 oz. Alcohol about 4.25%," such bottles, together with caps and labels, being identified by defendant and by manager for plaintiff, as being same brand of goods as those sued for, one defense being

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that goods sued for were malt, alcoholic, and intoxicating liquors, sale of which was in violation of penal statutes. 21 App. 264 (2) (94 S. E. 282).

Where traveling representative of plaintiff personally took defendant's order for whiskey in Georgia, and whiskey was shipped to defendant from outside the State, and at time order was given, defendant stated to plaintiff's representative that he was buying whiskey to sell in Georgia in violation of law, note for purchase price was based upon immoral and illegal consideration and could not be enforced. 18 App. 132 (1) (88 S. E. 901).

Plaintiff was not entitled to recover in action for price of whiskey labels and cartons, which plaintiff, company of another state, engaged in business of selling whiskey, sold to defendants, its agents located in this State, and it appearing that contract for purchase of such articles was made in this State, and that their price was part of consideration for sale of whiskey therein, and that they were to be used for single purpose of promoting sale of whiskey therein, in violation of law of State. 20 App. 154 (92 S. E. 772).

Lewd house: Plaintiff in bail-trover not entitled to recover, where his right of action depended upon an immoral contract. 141/456 (81 S. E. 196).

To keep a lewd house is penal, and any person who knowingly rents or sells personal property to be used in such a house will not be assisted by courts to recover such property or the value thereof; the contract, being contra bonos mores, will not support an action. 18 App. 444 (1) (89 S. E. 592).

Where electric piano was sold to woman of ill fame by dealer who knew her to be such, and knew that piano

was to be used in lewd house for purpose of attracting men thereto and entertaining them therein, contract was founded upon illegal and immoral consideration, and where such contract was not fully executed, neither party could enforce it. 18 App. 444 (2) (89 S. E. 592).

Lottery: No defense to action for breach of contract to reimburse plaintiff for money expended in a purchase of stock certificates, that the corporation was engaged in a lottery enterprise. 144/89 (80 S. E. 556).

A court of equity will not enforce an agreement to pay a capital prize in a lottery or gift enterprise. 148/283 (96 S. E. 498).

Contract under which plaintiff was to write to 150 persons, whose names were furnished by defendant, to induce them to form clubs of ten, who would make cash purchases at defendant's place of business and receive from defendant vote coupons, representing amounts of their purchases, which could be voted for contestants for prizes furnished by plaintiff, and the lady receiving the highest number of votes to receive piano as prize, was not a lottery. scheme or device. 20 App. 270 (92 S. E. 1009).

Parties: Ordinarily invalidity of void contract may be asserted by any person whose interest may be affected by its provisions. 15 App. 663 (1) (84 S. E. 147).

Petition: Where plaintiff's petition plainly shows that his alleged cause of action is based upon the breach of an illegal contract, general demurrer was properly sustained. 18 App. 195 (89 S. E. 176).

Punch board: Contract here for punch board was not shown to be based on a gambling, immoral or illegal consideration. 19 App. 481 (91 S. E. 783).

§ 4252. (§ 3667.) Attorney's fees in notes.

Amount: Not error to charge here in action on note providing for 10 per cent. attorney's fees that plaintiff was entitled to recover such fees on any amount which should be found due

upon note. 141/565, 567 (8) (81 S. E. 886).

Where note provided for interest after maturity and for attorney's fees on default, as liquidated damages,

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and in action on note defendant pleaded partial payment only, it was proper to charge that if the jury found against defendant's contention, they should compute the attorney's fees on the principal and interest. 142/145 (1) (82 S. E. 562).

Where promissory note contains agreement to pay all costs of collection, including ten per cent. attorney's fees, the attorney's fees amount to ten per cent. on principal and interest. 18 App. 194 (3) (89 S. E. 154).

Where note provided that should payee deem it necessary to employ attorney or should note be placed in hands of attorney after default for collection, maker would pay all fees and costs, which fees and cost should become part of the principal debt, petition in action on note asking for 10 per cent. of the principal and interest as attorney's fees was not demurrable on ground that, under the contract, amount of attorney's fees sued for was not recoverable, as under the petition reasonable attorney's fees, not exceeding amount sued for, were recoverable. 20 App. 755 (2) (93 S. E. 271).

Note given for stated sum as principal, to bear interest after maturity, and providing for payment of ten per cent. as attorney's fees "on amount of said debt," authorizes recovery of such fees on amount of both principal and interest. 22 App. 83, 84 (3) (95 S. E. 317).

Decedent's estate: Where note given by decedent provides for payment of attorney's fees, his estate may be made liable therefor in suit thereon against administrator in which such fees are claimed, after notice of claim has been served as prescribed by statute. 23 App. 244 (1) (97 S. E. 889).

Evidence: Court did not err in admitting in evidence note sued upon for purpose of establishing right of plaintiff to recover attorney's fees therein stipulated for, since in absence of plea of non est factum note was admissible without proof of its execution. 18 App. 445 (3) (89 S. E. 635).

Court did not err in excluding evidence as to certain payment on note sued upon, where in plea of defendant amount of principal and interest was

not in dispute, and there was no plea of payment, and note provided for payment of specific sum of \$500 as attorney's fees, and only \$450 as attorney's fees was asked for; so that any payment made on principal and interest could not affect amount of attorney's fees recoverable. 18 App. 445 (4) (89 S. E. 635).

Indorsers of a note here held liable for attorney's fees provided for. 141/578, 579 (4) (81 S. E. 892).

Judgment: Where, in action on note conditioned for payment of attorney's fees if collected through attorney, defendant's unsworn answer was erroneously stricken, error to overrule motion made during the term to vacate judgment for plaintiff which included attorney's fees. 14 App. 29 (2) (79 S. E. 905).

Plaintiff was not entitled to judgment for attorney's fees as upon unconditional contract in writing. *Id.* 29 (3).

Judgment in case tried without jury on unconditional written contract providing for attorney's fees should be in language indicating that judge found that written notice was given as required. 17 App. 463 (3) (87 S. E. 701).

Judgment here sufficiently indicated that judge, on admission in open court, found that written notice of suit had been given. *Id.*

Mere improper inclusion of attorney's fees in judgment on note did not render entire judgment void, where it could be purged of such fee and allowed to stand for principal, interest, and cost. 145/164, 165 (3) (88 S. E. 951).

Judgment by default, entered by superior court as on an unconditional contract in writing, wherein amounts for principal, interest, and attorney's fees are separately stated, will be held good as to items for principal and interest, and void as to attorney's fees. 21 App. 546 (1) (94 S. E. 818).

Where Supreme Court specifically held that original judgment in instant case was rendered by court, without intervention of jury, for principal, interest, and attorney's fees, on theory that obligation to pay attorney's fees

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was unconditional, and that portion of judgment so separately rendered for attorney's fees was illegal, question is *res judicata*, and judgment could not be subsequently amended so as to have contrary meaning and carry different legal import. 21 App. 619 (2) (94 S. E. 835).

In suit on note providing for payment of attorney's fees in addition to principal and interest, court is without jurisdiction to include in judgment, as rendered on unconditional contract in writing, any amount for attorney's fee; but where items of principal, interest and attorney's fees are separately stated in judgment, in proper case plaintiff may be enjoined from enforcing so much of the judgment as embraces item of attorney's fees, leaving it to be enforced for the principal and interest. 146/127 (2) (90 S. E. 958).

Jury: Judgment can not be rendered for attorney's fees without intervention of jury on note providing for such fees. 143/394 (85 S. E. 104).

Where petition, in action on note providing for attorney's fees, alleges that required written notice has been given, and no defense has been filed or denial of notice made, judgment may be rendered for fees without jury trial. 16 App. 466 (3) (85 S. E. 679).

Notice: Not necessary to attach copy of notice to petition which alleges that notice has been given. 140/603 (3) (79 S. E. 540).

Allegations that plaintiff had caused to be served upon defendants a written notice of intention to bring suit "to this term of this court and to claim attorney's fees in accordance with terms of said original note," together with prayer for recovery of such attorney's fees, was sufficient notice of intention to sue on original note and to seek recovery of attorney's fees according to its terms. 140/653, 654 (4) (79 S. E. 539).

Unsigned notice of intent to sue, which was served on one defendant, in connection with properly signed notices, which were served on other defendants, was properly admitted in evidence in action against a corpora-

tion as principal and two individuals as sureties on note providing for attorney's fees. 141/578 (2) (81 S. E. 892).

Though carbon copy offered in evidence differed in material respects from the notice actually served on defendant to fix liability for attorney's fees in action on note did not render such copy objectionable as immaterial and irrelevant. 141/840 (82 S. E. 246).

Where note secured by deed provided for attorney's fees, filing of petition by debtor's administrator to marshal assets and the order thereon did not prevent creditor from including attorney's fees in his suit. 143/347 (2) (85 S. E. 190).

Obligation in note to pay attorney's fees is unenforceable unless maker after receiving notice of intention to sue fails to pay debt on or before return date. 143/394 (85 S. E. 104).

This section does not authorize recovery of attorney's fees on note which contains no provision therefor, though notice of intention to sue was given. 143/736 (2) (85 S. E. 881).

Service of notice of claim for attorney's fees on person who signed notes sued on as secretary and treasurer of defendant corporation was proper, where corporation admitted his authority to sign notes. 144/114 (2) (86 S. E. 223).

In absence of demurrer, statement in petition that defendants had been notified of suit in writing, ten days before filing same, construed in connection with allegation that defendants in their note, copy of which was attached to petition, promised to pay certain attorney's fees, was sufficient basis for recovery of such fees. 13 App. 119 (2) (78 S. E. 862).

Notice by letter of claim for attorney's fees is sufficient, if letter conveys such notice as is required by law and is timely received by defendant; not necessary to state in petition how notice was served. 13 App. 309, 310 (5) (79 S. E. 165).

A note stipulating for attorney's fees is conditioned upon proof that the maker was served with notice as required by this section, and such

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fees can not be recovered unless answer of defendant or testimony shows that notice was given. 13 App. 547 (1) (79 S. E. 180); 142/48 (1, 2), (82 S. E. 441); 17 App. 75 (1) (86 S. E. 279).

Though suit be in default, it is error, in absence of proof of notice, to enter judgment for fees. 13 App. 547 (2) (79 S. E. 180).

Defendant's unsworn denial in suit on note conditioned for payment of attorney's fees, if collected through attorney, that statutory notice has been given is sufficient. 14 App. 29 (1) (79 S. E. 905).

Notice given here to recover attorney's fees on note sufficiently complied with this section. 14 App. 80 (80 S. E. 301).

Allegation that in terms of law petitioner gave notice of intention to sue unless note was paid, and that defendant failed to pay, was sufficient, in absence of special demurrer, to authorize introduction of proof authorizing recovery of attorney's fees. 14 App. 293 (2) (80 S. E. 699).

Fact that carbon copy of notice served differed in certain immaterial respects from notice actually served did not render such copy objectionable as immaterial and irrelevant. 141/840 (82 S. E. 246).

Notice stating that notes to be sued on are in favor of Mrs. C. H. B. sufficiently indicated legal holder of note to authorize recovery of such fees in suit by Mrs. C. H. B., wherein it appears that she was original payee. 14 App. 300 (80 S. E. 723).

Recovery of attorney's fees provided for in note can not be had in action thereon, where plaintiff does not give written notice of intention to sue. 14 App. 329 (1) (80 S. E. 913).

Under section 5662, allegation of petition that notice required by this section has been given will be taken as true, where no defense is filed. Id. 329 (2).

Judgment should indicate that judge has found that written notice has been given, though petition alleged giving of notice, and no defense is made. Id. 329 (4).

Where notice has been given, holder's right to recover attorney's fees becomes vested. Id. 329 (6).

Where notice to fix attorney's fees indicates that suit is to be brought by holder, it is not rendered ineffectual by amended petition naming assignor as plaintiff suing for holder's use. 15 App. 133, 134 (2) (82 S. E. 772).

Notice was sufficient where it named term preceding term to which suit was returnable, though petition was filed at term named. Id. 133, 134 (3).

In absence of evidence that notice of intention to sue was given it was error to direct verdict for plaintiff for attorney's fees. 15 App. 650 (2) (84 S. E. 151).

Where notice had been served plaintiff's right to recover attorney's fees was not affected by appointment of receivers for debtor after service of notice or by want of notice to them. 15 App. 778 (2) (84 S. E. 222).

Direction of verdict for attorney's fees was error, where there was no evidence tending to show legal notice, and petition alleged, and defendant expressly denied, notice. 17 App. 425 (2) (87 S. E. 602).

Where plaintiff in justice's court sues on note and summons is silent as to giving of notice specified in this section, suit is not to be construed, in determining jurisdiction of justice, as suit for attorney's fees, though petition attached to summons asks attorney's fees. 17 App. 450 (1) (87 S. E. 679).

Notice signed by one as attorney for estate and stating that he held for collection certain notes and that suit would be brought by him as attorney, sufficiently disclosed who was holder, who intended to sue, and to whom payment should be made, to enable defendant to make payment and relieve himself from liability for attorneys' fees, where suit was brought by executors. 17 App. 463 (2) (87 S. E. 701).

That part of judgment which included attorney's fees was void and open to attack under section 5957,

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where it appeared that notice of intent to include such fees failed to state name of holder of note. 17 App. 517 (87 S. E. 770).

Where defendant not served at term at which petition with process attached was filed was served, pursuant to order of court, at next term, this section was substantially complied with, where notice stated that suit would be filed at that term of court. 17 App. 711 (1) (88 S. E. 211).

In absence of affirmative statement to contrary in record, reviewing court must presume that all necessary legal steps were taken, and therefore that there was proper proof of notice requisite to bind defendant for attorney's fees. 18 App. 126 (1) (88 S. E. 909).

Proof that carbon originals of notices to bind for attorney's fees, after being registered, were deposited in the United States mail, addressed to each of two defendants, and that plaintiff's attorney received from each a registry receipt, dated more than ten days before last return day for term of court to which suit was brought, was sufficient to show that defendants had received due and timely notice of claim for attorney's fees. 18 App. 181 (3) (89 S. E. 177).

Terms of this section were not complied with where attached to summons issued from municipal court of Atlanta was paper purporting to be in compliance with section, and copy of the summons, with this paper, was served on defendant. 18 App. 284, 285 (1, 2) (89 S. E. 459).

Where in suit on note it is sought to recover, in addition to principal and interest, certain per centum thereon as attorney's fees for collection, as provided for in note, and it appears from petition that notice of intention to bring suit has been given, and no defense interposed, averment as to giving of notice will be held to have been admitted, and no proof other than implied admission is necessary to authorize recovery of such fees. 18 App. 586 (2) (89 S. E. 1103).

Where jury did not find attorney's fees, plaintiff in error can not complain

as to form of notice therefor. 19 App. 42, 44 (10) (90 S. E. 984).

Where notice as to intention to sue in city court for attorney's fees has been given as required by this section, such fees may be recovered in an action in that court, although at time of giving of notice suit was pending in superior court of county on same note, latter suit being dismissed after giving of notice that action would be brought in city court. 19 App. 69, 70 (3) (90 S. E. 1033).

Amendment adding payee of notes as plaintiff, suing for use of original plaintiffs, did not render ineffectual the notice given by the original plaintiffs for purpose of recovering attorney's fees. 19 App. 133, 134 (2) (91 S. E. 254).

Where, in suit on note in city court of Atlanta, petition recites giving of statutory notice for collection of attorney's fees, and case is in default, judge may, without further proof than admission implied by failure of defendant to answer, direct verdict in favor of plaintiff for amount sued for. 19 App. 471 (1) (91 S. E. 788).

Statutory requirements were complied with here, notwithstanding omission of word "suit" from statement that "we will institute _____ on same in the superior court Stewart county, returnable to April term, 1915." 19 App. 809 (1) (92 S. E. 286.)

Where notice is given of intention to sue on note providing for attorney's fees, and suit is not filed until last return day of term of court specified in notice, tender of principal and interest upon note on that day, and after suit has been filed, will not relieve debtor from obligation to pay attorney's fees. 20 App. 348 (2) (93 S. E. 43).

Fact that maker of note payable to and indorsed by maker was not given notice as to attorney's fees required by this section, and was not sued with other indorsers of note, was no reason why judgment for such fees should not be rendered against the indorsers who were served with such notice and sued. 20 App. 576 (1) (93 S. E. 173).

Although defendant denied having received statutory notice necessary to

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bind it for payment of attorney's fees, and although giving of such notice was not shown by the proof, conduct of counsel for defendant, upon the trial, in failing to notify court that issue as to attorney's fees was contested, when he knew that court was under impression that there was no contest, estopped him from raising the question thereafter. 20 App. 695, 696 (3) (93 S. E. 279).

Allegation that defendant "has been notified of this suit, and if same is not paid by 30 day of March, 1916, 10 per cent. attorney's fees will be due," is insufficient to show that before suit defendant was given notice in writing of intention to sue and of term of court to which suit would be brought, where suit is brought on note, for principal, interest, and attorney's fees. 20 App. 701 (1) (93 S. E. 253).

Where answer denied allegation that notice for attorney's fees was given, and no proof of giving of such notice was made, it was error to direct verdict including such fees. 21 App. 43 (2) (93 S. E. 524).

It was not error for court, in money-rule proceeding, to admit in evidence justice's court executions each for \$100 principal, besides interest and attorney's fees, where it was also shown that summons from justice's court in which they were obtained failed to state giving of notice for attorney's fees, where it was also the executions had entered thereon, "The attorney's fees shown in within fi. fa. not having been used for, the same are hereby disclaimed and written off." 21 App. 270 (1) (94 S. E. 288).

Where justice's court summons is silent as to giving ten days' notice of intention to sue for attorney's fees, suit can not be treated as claiming such fees, and justice's court has jurisdiction of cause if amount of stated principal sued for be within \$100, and can render legal judgment therefor, with interest. 21 App. 270 (1) (94 S. E. 288).

Contention that judgment for attorney's fees obtained in 1909 should be sustained upon assumption of its validity, for reason that it does not appear from agreed statement of facts

whether note sued on was executed before or after Georgia Laws 1890-1, p. 221, is not sound, such statement showing that statutory notice had been given and that no denial thereof had been made. 21 App. 546 (2) (94 S. E. 818).

Where return day for filing suits in a court is the fifteenth of the month, and petition is filed on that day, notice to bind for attorney's fees, served on the fifth of the same month, is served "ten days before suit is brought." 21 App. 466 (94 S. E. 657).

Where maker of note containing provision for attorney's fees dies and administrator is appointed, and statutory notice of intention to sue thereon for principal, interest, and attorney's fees is given to the administrator, and such a suit is brought, plaintiff is entitled to judgment for attorney's fees in addition to principal and interest. 21 App. 727 (2) (94 S. E. 899).

It was error for court, at term subsequent to that at which was rendered judgment striking answers, to modify that judgment by declaring that it should not be enforced in so far as it struck denial of service of notice of claim for attorney's fees; as modification was not objected to by plaintiff, and as it was for benefit of defendants, and as plaintiff submitted proof of service of notice, defendants were not injured thereby. 22 App. 558 (1) (96 S. E. 444). See 149/72 (99 S. E. 121).

On trial of issue of service of notice for collection of attorney's fees court did not err in rendering judgment for plaintiff, for principal, interest, and attorney's fees separately, where there was ample proof submitted by plaintiff to warrant such judgment and no evidence was introduced by defendant. 23 App. 622, 623 (2) (99 S. E. 141).

Plea alleging that notice required for recovery of attorney's fees had not been given was good, though not verified. 142/48 (3-a) (82 S. E. 441); 13 App. 547 (79 S. E. 180); 17 App. 75 (1) (86 S. E. 279).

Plea denying indebtedness in amount claimed and alleging that notice required for recovery of attorney's fees

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had not been given, and that defendant was a minor when he executed the note, need not be sworn to where petition is not verified. 142/48 (3) (82 S. E. 441).

Striking of plea denying indebtedness for attorney's fees and that plaintiff had given statutory notice was harmless, where defendant was permitted to introduce evidence on such issue, and such issue was submitted to jury. 17 App. 443 (87 S. E. 607).

§ 4253. (§ 3668.) **Contracts against public policy.**

Administrator: Agreement to convey on stipulated terms, and go through the form of a public sale to consummate a previous agreement, would be contrary to public policy and unenforceable. 141/419, 420 (6) (81 S. E. 196); 145/475 (1-a) (89 S. E. 573).

Corporation assets: Agreement between one of several stockholders and retiring stockholder to divide corporate assets is contra bonos mores and fraudulent as to creditors. 15 App. 555 (2) (83 S. E. 967).

Evidence here showed that basis of plaintiff's suit was illegal agreement between one of several stockholders and retiring stockholder to divide corporate assets. *Id.*

Criminal prosecution: Conveyance of property to secure release of person imprisoned under warrant issued principally to enforce collection of a debt was void. 143/143 (1) (84 S. E. 549).

Freight rate: Contract for rate different from that published for interstate shipments is void. 14 App. 716, 717 (2) (82 S. E. 318).

Immoral purpose: Mere knowledge of lender, without participation in illegal transaction, that money is to be used for illegal or immoral purpose, will not prevent recovery of money. 16 App. 7 (1) (84 S. E. 222).

Justice of peace: Contract made by justice of peace with one claiming indebtedness from many persons on account, that latter will turn over accounts to former for suit, upon understanding that neither justice nor constables will hold plaintiff liable for costs, is opposed to public policy. 145/539 (1) (89 S. E. 514).

Surety on promissory note providing for payment of attorney's fees is ordinarily liable therefor. 19 App. 148 (3) (91 S. E. 235).

Usury: Stipulation for recovery of ten per cent. as attorney's fees, in note payable to national bank, is not usurious and unenforceable, but may be enforced when provisions of law as to notice are complied with. 22 App. 58, 59 (6) (95 S. E. 381).

Lewd house: That houses on which loan is made to obtain money for improving them are to be used for illegal purposes does not destroy consideration of loan. 16 App. 7 (1) (84 S. E. 222).

Where owner of house and lot sells same to one who intends to use it for purpose of maintaining it as a house of prostitution, and the vendor knows purpose for which it is bought, and use for which it is to be put, notes taken for purchase money will be based upon illegal and immoral consideration, and will be unenforceable in hands of first taker or his transferee. 149/72 (2) (99 S. E. 121); 23 App. 724 (99 S. E. 387).

Punch board: Contract here for punch board was not shown to be based on a gambling, immoral or illegal consideration. 19 App. 481 (91 S. E. 783).

Railroad: Provision in contract leasing portion of railroad right of way as pasture for live stock that tenant would save and hold harmless the company from all damage or liability that might arise from destruction or injury of any building or personal property from any cause whatever, whether same should be attributed to negligence of employees of company or not, where such damage or liability was caused or increased by reason of use of the premises, was not void as contrary to public policy. 22 App. 1 (95 S. E. 368).

Railroad depot: Contract by railroad company to locate station at given point is not per se void; contract is enforceable unless shown that there is such a conflict between railroad company's duties to public and its

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duties under the contract that it is impossible to discharge former without abandoning the latter. 13 App. 357, 358 (6) (79 S. E. 187).

Restraint of trade:

Corporate stock: Contract under which stock in railroad company was transferred to trustee to whom mortgage given to secure bond of corporate owner of stock was executed, right to vote stock being retained by owner, was not invalid as in restraint of trade. 144/665, 668 (8) (87 S. E. 897).

Evidence: Where true meaning of contract in restraint of trade is equivocal, circumstances existing when contract was made, as well as existence of custom so well known that parties must have contracted with intention that it would apply to their contract, may be shown by parol evidence. 149/200 (1) (99 S. E. 615).

Intention: Contracts in restraint of trade must be reasonably construed, and when intention of parties is ascertained it must be effectuated. 149/200 (1) (99 S. E. 615).

Re-entering same business: Contract binding seller not to engage in same business in same city for three years was not void as in restraint of trade or unreasonable. 143/18 (2) (84 S. E. 63).

Refrain from business: Provision in contract of sale of corporate stock obligating seller not to engage in competitive business in limited territory for five years, was not invalid as being in general restraint of trade; nor was limitation unreasonable. 141/613 (1) (81 S. E. 852).

Agreement in restraint of trade, ancillary to contract of employment, supported by valuable consideration,

Restraint of trade—continued.

and limited as to both time and territory, and not otherwise unreasonable, is enforceable. 148/500 (1) (97 S. E. 66).

If consideration for agreement in restraint of trade, ancillary to contract of employment, and limited as to both time and territory, be legal, it is sufficient; adequacy of consideration is matter to be determined by parties. 148/500 (2) (97 S. E. 66).

Sunday: Where one, in pursuance of work of ordinary calling, hires to another on Sunday a conveyance which is used on that day, subsequent promise by user to pay for conveyance, made on a secular day, without any new consideration, will not support action either for sum agreed upon or upon account for value of hire. 13 App. 437 (2) (79 S. E. 357).

That contract was executed on Sunday was immaterial, where plaintiff broker recovered on quantum meruit or implied contract to pay for his services. 15 App. 735 (3) (84 S. E. 201).

Note signed on Sunday, but not delivered on that day, is not contract made on Sunday. 16 App. 651 (85 S. E. 941).

Where principal maker of note made on Sunday procures signature of surety and delivers note on week day, he ratifies same. 16 App. 651 (85 S. E. 941).

Plea that note was signed on Sunday, and therefore void, was without merit, where the note bore date of June 14, 1912, which was on Friday, and it was not shown that the note was made on a different date. 18 App. 73 (3) (88 S. E. 918).

§ 4254. (§ 3669.) **Fraud.**

Diligence: True statement by plaintiff's agent in procuring note does not constitute fraud, though agent did not fully state contents of note, where defendant is able to read and there is no reason why he should have reposed special confidence in the agent, and no exigency compelled him to

haste in executing the note. 13 App. 346 (2) (79 S. E. 211).

Wrongful conduct of scrivener, who did not write contract as instructed, will not relieve party who directed its preparation, but who failed, through his own negligence, to read it before sending it to the other party, who in

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good faith accepted it and acted upon it. 146/139 (1) (90 S. E. 855).

Where terms, stipulations, and conditions of oil and gas leases were clear and certain, and lessor was man of ordinary intelligence, able to read, and understood all terms of leases, petition by him against lessee praying cancellation of leases on ground of fraud in procuring them and in misrepresenting terms thereof, was subject to general demurrer. 148/689 (98 S. E. 263).

If as matter of fact one signing contract could not read instrument as written by agent of other party, and if agent, when she stated she could not read it, agreed to read it to her and pretended to do so, but in reading he so varied terms of writing that as read orally writing varied materially from oral reading, a fraud was practised which signer could set up as defense to enforcement of writing. 149/737 (1) (101 S. E. 792).

Where no sufficient allegation as to an emergency was made to excuse defendant's failure to read contract, court did not err in striking part of plea relating to his failure to read it. 19 App. 166 (2) (91 S. E. 246).

Fraud which would relieve a party who can read must be fraud which prevents him from reading. 20 App. 123 (92 S. E. 893).

One who signs instrument written by opposite party at interest therein, without reading it when he is capable of doing so, can not afterwards set up fraud in the procurement of his signature, when no trick or artifice was resorted to for purpose of inducing him to sign, and it was not signed under emergency requiring haste. 20 App. 766 (1) (93 S. E. 233).

Where account is stated by creditor, and debtor gives his promissory note in settlement, and is grossly negligent in failing to inform himself as to elements of account, he will not be allowed to plead, as a defense to action upon the note, that certain items in the account for which he was not legally liable were fraudulently placed therein, where his plea does not show that any trick or artifice was used to prevent him from discovering the

fraud. 21 App. 100 (1) (93 S. E. 1023).

Where agent sold guano to one who could neither read nor write, and afterward went to home of purchaser whom he told that he had come to get his signature to "the guano note," and thus secured purchaser's mark to a note in which was embraced a mortgage on the crop, of which latter fact agent did not apprise the purchaser, there was such a fraud as, when properly pleaded and proved, would relieve purchaser of liability under the mortgage, it not appearing that there was any third person present who could read and write and the purchaser being compelled to rely upon representations of agent. 21 App. 282 (1) (94 S. E. 310).

Where one who can read signs contract without apprising himself of contents, otherwise and by accepting representations made by opposite party, with whom there exists no fiduciary or confidential relation, he can not defend on ground that contract does not contain contract actually made, unless it should appear that at the time he signed it some such emergency existed as would excuse his failure to read it, or that his failure to read it was brought about by some misleading artifice or device perpetrated by opposite party, amounting to actual fraud, such as would reasonably prevent him from reading it. 21 App. 512 (2) (94 S. E. 892).

One able to read, who executed written contract without reading it, can not avoid liability thereon because he signed without knowing contents of contract, when his so doing was not induced by any action or representation amounting to fraud on part of person with whom he was dealing. 21 App. 580 (94 S. E. 896).

Plea in action on note given for purchase price of certain goods that at time goods were shipped the seller sent the note to a certain bank, and defendant had to sign same and pay amounts named before he could inspect the goods, and did not have opportunity of fully examining said note, set up nothing in way of evidence. 21 App. 634, 636 (1-a) (94 S. E. 897).

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Plea not showing that when contract was signed there was such an emergency as would excuse defendant from reading it, nor showing any confidential or fiduciary relation between the parties, nor that failure of defendant to read contract was brought about by any misleading artifice or device amounting to fraud, demurrer thereto was erroneously overruled. 21 App. 634, 635 (1-a) (94 S. E. 897).

Where only evidence submitted by defendant in suit for sum alleged to be due upon plain and unambiguous contract in writing was to effect that he was ignorant and did not read the contract, that nature of contract was misrepresented and he thought he was signing entirely different contract, but nothing was done to prevent him from reading it or having it read to him, not error to direct verdict against him for amount appearing to be due under contract. 23 App. 273 (1) (97 S. E. 869).

One able to read, who executed written contract without reading it, can not avoid liability thereon because he signed without knowing contents of contract, when his so doing was not induced by any action or representation amounting to fraud on part of person with whom he was dealing. 24 App. 244 (1) (100 S. E. 573).

Evidence: Where defendant relied upon plea of fraudulent representations by plaintiff's agent, in procuring him to sign contract, but the evidence wholly failed to sustain such plea, verdict for plaintiff was demanded. 18 App. 74 (3) (88 S. E. 909).

In pari delicto: Court did not err, in action on due bill payable to plaintiff, which defendants contended was for money due to plaintiff's husband and not to herself, in excluding testimony offered by defendants to show that husband requested that due bill be made payable to her for purpose of preventing certain creditor of himself from collecting debt by garnishment. 18 App. 583 (1) (90 S. E. 88).

Injury: Plea setting up defense that note given as evidence of pre-existing debt, justness of which was not denied, was void, because, as alleged, defendant would not have executed

note but for promise on part of payee to "run him" the next year was properly stricken, there being no allegation that defendant was injured or damaged by the written promise to pay his debt. 18 App. 217 (89 S. E. 161).

Intoxicating liquor: Plea in suit on unitemized account that plaintiff contracted to sell defendant an article called "special," and that plaintiff knew that the same was being bought for resale, and represented that the sale of said "special" was not prohibited by law, and same was not a substitute for beer, etc., whereas it was manufactured and intended as a substitute for beer, etc., which facts plaintiff knew and defendant did not know, was not subject to demurrer. 20 App. 105 (1) (92 S. E. 548).

Mule: Warranty in written contract for sale of mule that it is "about ten years old," and warranty that seller "does not warrant life, soundness, nor works of said mule, only the title thereto," construed together, mean that except that as to the fact that the mule was about ten years old, every other warranty as to its kind or quality was excluded, as well as all implied warranties as to soundness of the mule, etc. 19 App. 166 (3) (91 S. E. 246).

Notes: Plea in action on note alleging that defendant, after having taken course of instruction in pharmacy, believing that he was attending a certain medical college, "a chartered institution authorized by law, and recognized in the medical and pharmaceutical profession, and the medical boards established by law, to be first class, and that its diploma would be given recognition without further examination," was informed that he would be given diploma on payment of amount of note sued on, and he made the note to the plaintiff, that he afterwards discovered that said college had ceased to exist before issuance of diploma; that diploma was without value, and that consideration for note had failed, etc., set forth no legal defense. 20 App. 205 (1) (92 S. E. 955).

Plea in action against surety or accommodation indorser stating that indorser signed note by reason of false

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statement then made set up no defense, as note had already been signed and delivered by principal and accepted by plaintiff. 21 App. 622 (3) (94 S. E. 915).

In order for married woman to defeat recovery by payee of note made by her, upon ground that her signature was procured by fraud and duress of her husband, she must not only show that such was fact, but also that payee was either party to such fraud and duress, or that he had knowledge

thereof. 23 App. 193, 194 (1) (98 S. E. 170).

Plea alleging fraud, but not alleging specific acts constituting fraud, should be stricken on demurrer. 21 App. 634, 637 (1-c) (94 S. E. 897).

Read contract, failure to: See **Diligence**.

Relief: Law is liberal in allowing ways and means for relieving from consequences of fraud, provided presence and evil of alleged fraud are first shown. 13 Ap. 346 (79 S. E. 211).

§ 4255. (§ 3670.) **Duress.**

Charge on law as contained in this section relating to duress by illegal imprisonment, threats of personal violence, etc., on issue of undue influence, was error here. 148/238, 239 (5) (96 S. E. 327).

Criminal prosecution: Where fears or affections of parents for their son and fears of son are wrought upon through criminal proceedings against him, and they are induced thereby against their will to convey property to pay alleged shortage of son in order to avoid prosecution, there is duress upon the parties so acting; and it is competent in action by prosecutor to recover the land, based on title derived through deeds executed by such parties, for them, by way of equitable defense, to set up the duress and have cancellation of the deeds. 146/624 (2) (92 S. E. 49).

Evidence: Where wife, suing to set aside conveyance claimed to have been procured through duress, testified to conversation between herself, her husband, and the grantee, the last named, who claimed conveyance was to discharge husband's debt, is competent to give his version. 143/837 (1) (85 S. E. 1034).

Husband and wife: Conveyance procured from wife by husband's creditor, by duress, when procured to obtain husband's release from imprisonment under warrant issued principally to enforce collection of debt, was void as to purchaser from creditor with notice of wife's equity. 143/143 (2) (84 S. E. 549).

Husband's threat to abandon wife unless she signed note not duress such as invalidated note, where she had no reasonable apprehension of threat being carried out. 143/186 (84 S. E. 467).

Threat by wife to prosecute husband for assault and battery and to sue him for divorce and for custody of children was not sufficient to invalidate agreement in settlement of disputed claims over property. 148/250, 251 (2) (96 S. E. 340).

Where facts alleged in regard to threat of bodily harm made by brother of plaintiff husband do not clearly and definitely connect defendant wife therewith, such threat does not amount to such duress as will invalidate contract between husband and wife in settlement of disputed claims over property. 148/250, 251 (2) (96 S. E. 340).

In order for married woman to defeat recovery by payee of note made by her, upon ground that her signature was procured by fraud and duress of her husband, she must not only show that such was fact, but also that payee was either party to such fraud and duress, or that he had knowledge thereof. 23 App. 193, 194 (1) (98 S. E. 170).

Pleading: Allegations of petition here were not sufficient to authorize cancellation of deed on ground of duress. 145/368 (3) (89 S. E. 330).

Threats: Fact that officers were about to levy on property belonging to

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debtor's wife and daughter after they had been informed of ownership did not establish duress, in action on check given to prevent threatened levy. 17 App. 466 (1) (87 S. E. 605).

Plea of duress in suit on note alleging that certain partners had threatened to prosecute defendant if he did not turn over certain money charged to be due from him was insufficient, where it did not allege that

the threats used were urgent or immediate. 22 App. 462 (96 S. E. 348).

Refusal to strike plea of duress which was insufficient because of failure to allege that threats used were urgent or immediate was harmless to plaintiff, where plea was not sustained by verdict, which treated note sued on as valid for its full amount, but allowed defendant certain credits, set up by another plea. 22 App. 462 (96 S. E. 348).

§ 4256. (§ 3671.) Gaming contracts.

Future delivery: See § 4117, catchwords Future delivery.

Where evidence showed that contract entered into by named person in behalf of certain others as a partnership was gambling contract for future delivery of cotton, and that such others were not a partnership for purpose of entering into such contracts, court did not err in directing verdict

in favor of plea of nul tiel partnership, or in directing verdict for such named person. 23 App. 272 (97 S. E. 887).

Note given in consideration of contract, making of which constitutes crime, is void, even in hands of innocent purchaser for value, before due, and without notice of defenses. 17 App. 649 (1) (87 S. E. 1101).

§ 4257. Dealing in futures prohibited.

Indictment: Ground of demurrer to indictment for dealing in futures on margin, in that indictment was bad because depriving defendant of inalienable rights to make contracts to be performed in other states, was without merit. 146/827 (2) (92 S. E. 637).

Demurrer to indictment for dealing in futures on margin, on ground that

another Code section, enacted at same time and as part of same act which includes this section, made proof of certain facts prima facie evidence of guilt, was not well taken. 146/827 (2) (92 S. E. 637).

Validity: This section is not invalidated by the United States Cotton Futures Act. 146/827 (3) (92 S. E. 637).

§ 4258. Contracts that are illegal.

See notes to § 4117.

§ 4261. Facts constituting guilt.

Evidence: Demurrer to indictment under section 4257, for dealing in futures on margin, on ground that this section made proof of certain facts

prima facie evidence of guilt, was not well taken. 146/827 (2) (92 S. E. 637).

§ 4262. Margins, when proof of guilt.

Evidence: Demurrer to indictment under section 4257, for dealing in futures on margin, on ground that this sec-

tion made proof of certain facts prima facie evidence of guilt, was not well taken. 146/827 (2) (92 S. E. 637).

Of construction of contracts.

CHAPTER 5.

Of Construction of Contracts.

§ 4265. (§ 3672.) Contracts, by whom construed.

Stated. 16 App. 321 (4) (85 S. E. 285).

Ambiguous contract: Court should construe unambiguous contracts, but construction of ambiguous contracts is for jury. 15 App. 794 (3) (84 S. E. 226).

Where parol evidence is admitted to explain ambiguity, not error to submit to jury whether contract was as plaintiff claimed or as defendant claimed. 16 App. 94, 95 (2) (84 S. E. 592).

Construction of contracts is for jury only where they are ambiguous and evidence aliunde must be resorted to. 17 App. 581 (1) (87 S. E. 823).

In action under contract to pay for delivery of certain advertising caps to plaintiff for delivery to retail dairies, amount being payable after delivery to plaintiff, under evidence merely that most of the caps were delivered, question whether they were delivered, so as to require payment, was for jury. *Id.* 581 (2).

It is duty of courts to construe unambiguous writings, but it is for jury to determine as to meaning of ambi-

guities in a contract, solving all doubts by rules of every-day life and in light of ordinary experience. 18 App. 208 (2) (89 S. E. 166).

Where contract was plain and unambiguous, court erred in not construing it and in submitting to jury question as to its meaning. 18 App. 253 (1) (89 S. E. 530).

Conclusiveness: Construction placed by judge, sitting both as court and jury, on contract whereby certain parties assume debts of partnership, is conclusive. 15 App. 794 (3) (84 S. E. 226).

Evidence: Where construction of contract is not involved, testimony that it was drawn by one of the parties after a certain form is immaterial. 143/470 (3) (85 S. E. 319).

Failure of court: Error in permitting jury to construe written contract was harmless, where jury gave it its proper construction. 16 App. 476 (1) (85 S. E. 681).

Purpose: Where purpose for which instrument was executed is properly at issue, question must be submitted to jury. 16 App. 699 (2) (86 S. E. 46).

§ 4266. (§ 3673.) Intention of parties must be sought.

Cited. 24 App. 646 (101 S. E. 815).

Stated. 13 App. 826 (2) (80 S. E. 1093); 16 App. 636 (1) (85 S. E. 943).

Agent: Contract by medical company with defendant to sell and deliver medicines manufactured by it, as defendant might reasonably require for sale from time to time in certain county in Georgia, except incorporated municipalities therein, gave defendant exclusive right of sale in remainder of said county excepting the municipalities. 24 App. 308 (100 S. E. 781).

Architect: Contract providing that certain person had employed architect to prepare working plans and specifications for apartments according to

sketches submitted and accepted with changes, that said architect agreed to do all the work in making plans and specifications for certain percentage of approximated cost, and that should said person wish the architect to supervise the construction, he agreed to pay an additional sum of certain percentage on cost of building completed, did not limit the architect, in drawing plans and making specifications, to any fixed sum as to cost of building. 21 App. 488 (1) (94 S. E. 593).

Automobile dealer: Contract attached to petition for its breach wherein automobile manufacturer granted plaintiff privilege of selling at price fixed by contract as many as 50 cars, he to pay price and draft attached to bill

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of lading for each car shipped, and which, as modified by letters, did not require order of number of cars specified in schedule attached to contract and entitled plaintiff to shipment of cars as ordered, was not contract of bargain and sale, but dealer's contract, and dealer could recover only difference between contract price and price at which he was to sell cars for which his orders were accepted. 24 App. 633 (2) (101 S. E. 693).

Cancellation: Where contract for erection of buildings provided that if contractor should fail to provide sufficient workmen or materials, owner should have right to require, by written notice, the contractor to employ such additional labor or material as engineers might direct to be put upon the work, etc., owner would be authorized to cancel contract, only upon furnishing of statement or certificate by engineers that in their opinion, under terms of contract, conditions are such as to warrant cancellation. 21 App. 758 (1) (95 S. E. 113).

Carloads: Contract calling for definite number of "large" carloads of lumber of certain kind and size at specified price per thousand feet, not too indefinite and uncertain to be enforced, it appearing that large carload of lumber, according to custom of lumber business, means any available freight car loaded to its fullest capacity, and is a term frequently used and so understood in the lumber business. 23 App. 135 (1) (97 S. E. 667).

Clerical error: Unintentional omission of scrivener in failing to strike out name and insert name intended did not defeat clear intention of contracting parties. 17 App. 620 (87 S. E. 904).

Compensation: Where plaintiff entered into contract with defendant, appointing latter collection agent, "subject to its schedule of charges," regular form for forwarding accounts for collection containing schedule of charges, which was furnished to plaintiff at time of signing contract, was admissible in action for money had and received. 18 App. 475 (3) (89 S. E. 634).

Card containing schedule of rates as to fees which was not shown to plaintiff was not admissible. Id. 475, 476 (4).

Correspondence: In construing contract it is proper, in order to arrive at intention of parties, to consider correspondence between them leading up to and consummating the contract. 22 App. 524 (2) (96 S. E. 583).

Costs: In clause in contract, "Party of the second part to pay to the party of the first part actual cost * * * including repairs, and 10% additional," "actual cost" contemplates whatever amount certain party may have paid out for notes executed by another and any unpaid installments on purchase price of land, and costs of any repairs which he may have made on the land. 149/589, 590 (2) (101 S. E. 582).

Cotton: Where contract by its terms covered entire output of cotton linters by mill for certain season, when operated at normal capacity and in good faith, delivery of estimated number of bales by defendant would not serve to discharge defendant from liability on account of unexplained failure to operate mill and produce usual and normal output for period covered by contract. 21 App. 688 (2) (94 S. E. 1037).

Deed: Where, in description in deed, land is bounded on one side by right of way of railroad company, true boundary line between land conveyed and right of way must be taken as boundary line, and not the line that was understood to exist at time of execution of deed, if there is variance between such two lines. 146/352 (1) (91 S. E. 117).

Where construction of contract upon which claimant based title was only question presented for determination, and trial court correctly construed instrument to be mortgage and not deed, court did not err in overruling certiorari. 19 App. 487 (3) (91 S. E. 786).

Delivery of goods: Nonsuit was proper in action for breach of contract to deliver coal, which was made subject to strikes, accidents, car supply, or other causes beyond control, where it was shown that the available supply of coal was exhausted by reason of floods, or the coal company was unable to supply coal as ordered, or upon the

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date ordered, by reason of inability to ship on account of shortage of cars, or other conditions provided for by the contract. 22 App. 597 (96 S. E. 708).

Easement: Where owner of land sold portion of it, deed reserving right to use thirty feet on one side for purpose of hauling logs and loading logs and lumber so long as he owned remainder of land and operated sawmill on it, and stipulating "that this right of use shall not interfere with business of grantee or his heirs or assigns in or to property conveyed," such restriction against interference with business was but limitation on reasonable use by grantor in enjoyment of easement, and did not permit destruction of easement by building of warehouse, although such house might be useful in conduct of business. 146/694 (2) (92 S. E. 220).

Evidence: Provision in contract between plaintiffs and defendants, under which lumber was shipped to third persons on orders from plaintiffs, that "all shipments are made subject to inspection at destination, unless specifically specified to the contrary, and with the understanding that report as rendered by consignee shall be accepted as original evidence of such inspection," did not render such reports exclusive evidence, or conclusive as to the matter to which they related. 20 App. 215 (92 S. E. 964).

Glass front: Contract that defendant should put in a new glass front to building was not uncertain or vague, it meaning that defendant should put in an ordinary, usual "glass front," or "show window," in the front of the building, for purpose of displaying goods, similar to "glass fronts," in other stores in the locality. 19 App. 472 (1) (91 S. E. 892).

Guaranty: In construing contract of guaranty with reference to whether or not notice referred to amounted to condition precedent to liability thereunder, instrument is not to be construed most favorably either for or against guarantor, but terms and language are to have reasonable and ordinary interpretation, according to intent of parties as disclosed by instru-

ment read in light of circumstances and purpose for which it was made. 20 App. 429 (2) (93 S. E. 106).

If, after application of rule that terms and language employed in contract of guaranty are to have reasonable and ordinary interpretation, according to intent of parties, etc., there still remains an ambiguity, such doubt will be resolved by construing instrument most strongly against person who prepared it; construction as would create condition breach of which would entirely relieve guarantor in absence of such intention appearing in contract, will not be favored. 20 App. 429 (2) (93 S. E. 106).

Language: Intention of parties is to be determined largely from language used. 17 App. 535 (1) (87 S. E. 825).

Natural wear and tear: Where contract for lease of restaurant with table linen and other articles requires return of property at termination of lease in as good condition as when received, except natural wear and tear incident to constant use, and the replacing of all articles broken or lost, or payment therefor at invoice value less yearly depreciation of 5% per annum, contract will not be construed as requiring lessee to replace or pay for linen completely worn out by natural wear and tear, or linen stolen from lessee which must have been destroyed by such wear before termination of lease if it had been so used. 20 App. 130 (92 S. E. 770).

Note: Where note and mortgage given to secure it are written upon the same paper and executed at the same time, they must be construed as constituting but one contract. 21 App. 741 (8-a) (95 S. E. 19).

Writing on back of mortgage-note, "For value received we hereby guarantee the collection and payment of the within note to M. C. Bank and consent to any extension, protest, demand, and notice of non-payment," and signed by payees, was in effect a transfer of the note to the M. C. Bank. 23 App. 710 (1) (99 S. E. 227).

Option contract naming number of acres in tract, county and state in which it was situated, and distance from county seat, and by way of further

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identification describing the land as being "my land of sixty-seven hundred acres, except graveyard of two acres," and giving the numbers of the lots which in whole or in part are included in the tract, was not so vague, uncertain, or indefinite that property could not be identified with aid of extrinsic testimony. 20 App. 653 (1) (93 S. E. 313).

Payment: Note stipulating that certain sum will be paid means that sum will be paid in money; parol agreement to pay in something else may not be shown. 13 App. 9 (4) (78 S. E. 682).

Even though agreement may refer to certain notes as having been given "in payment," they are not to be so taken, where, by terms of same instrument, one of the conditions of the contract is to effect that obligations made by notes shall be promptly met. 22 App. 280 (2) (95 S. E. 1028).

Sale: It was error to strike plea as to defendant's offer to return to plaintiff unsold goods shipped to defendant under contract attached to petition. 20 App. 206 (92 S. E. 1013).

Where purchaser of certain property agrees to give to seller half of any net profits accruing from resale thereof, there can not ordinarily be recovery under the agreement until the proceeds of the resale have been reduced to money, or so appropriated as to constitute complete equivalent to reception of their money value. 21 App. 630 (3) (94 S. E. 841).

Timber: Conveyance of all timber growing on certain land, with right to cut same down and to remove it, includes all trees standing on the land suitable, at time of grant, for use in manufacture of lumber, and does not embrace sprouts and small saplings. 146/113 (1) (90 S. E. 960).

Lease of pine timber, measurement to be fourteen inches through diameter in box, for sawmill purposes and other purposes, which would measure

not less than twelve inches from ground, covered timber described, and did not restrict its use "for sawmill purposes" only. 146/546 (91 S. E. 682).

Time: Where conditions on which a forfeiture of time extension allowed by contract to pay certain indebtedness could be avoided were made impossible of performance by express provisions of latter contract, debtor could not be held to have forfeited such extension. 19 App. 341 (91 S. E. 513).

Title: Under contract which obligated lessee to surrender premises and remove building or improvements, on being given stated notice, lessee did not acquire title to structure on premises as it existed at time of lease, nor any right to material of which it was then composed. 148/308, 309 (2) (96 S. E. 386).

Warranty: Whether affirmation of soundness of horse made at time of sale amounts to warranty depends on intention of parties. 143/44 (1) (84 S. E. 116).

Statement in written contract for sale of mule that it is "about ten years old" will be regarded as express warranty that animal is about that age, and where same contract contains express warranty that the seller "does not warrant life, soundness, nor works of said mule, only the title thereto," both warranties should be construed together so as to reconcile all parts, and if this is impossible entire warranty should be construed most strongly against party who prepared it and in whose favor it is made. 19 App. 166 (3) (91 S. E. 246).

Covenant of general warranty of title to timber described in conveyance on which was based defendant's claim of breach of warranty is to be construed in connection with other parts of deed and with contemporaneous written agreement of party to conveyance. 20 App. 682 (1) (93 S. E. 301).

§ 4267. (§ 3674.) Intention of one party known to the other.

Acquiescence: Where letter from one party to a contract to the other showed that the writer placed a different construction on the contract

than did the other party, the latter's silence was an acquiescence in such construction. 13 App. 779 (80 S. E. 28).

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Correspondence: In construing contract it is proper, in order to arrive at intention of parties, to consider correspondence between them leading up to and consummating the contract. 22 App. 524 (2) (96 S. E. 583).

Cotton: If one of the parties to contract for sale of cotton for future delivery, apparently valid on its face, enters into contract evidenced by writing with no intention of delivering actual cotton, but upon understanding that settlement is to be had by parties on

day appointed for delivery, based on difference between market price at that time and contract price, and such intention is known to opposite party at time of signing writing, transaction will be regarded as a wager and not an enforceable contract. 146/277 (1) (91 S. E. 51).

One party: Meaning placed on contract by one party and known to be thus understood by other party is true meaning of contract. 143/569 (2) (85 S. E. 756).

§ 4268. (§ 3675.) Rules of interpretation.

1.

Stated. 141/578, 581 (81 S. E. 892); 16 App. 39, 41 (84 S. E. 490).

Capacity: Parol evidence is inadmissible to show that a contract signed by an individual was executed by him as agent and general manager of a railroad company. 141/219, 221 (80 S. E. 716).

Notice here by cotton-buyer to bank directed to warehouse company held ambiguous, so that parol evidence was admissible to explain whether it was intended to apply to cotton already purchased, or whether it also included subsequent purchases. 142/99 (1) (82 S. E. 481).

2.

Expert testimony: Generally words in contract are to be given usual and primary meaning at time of execution of contract, but words of art, or words connected with peculiar trade, are to be given signification attached to them by experts in such art or trade. 148/188 (4) (96 S. E. 226).

Hides: Petition in seller's action to recover difference between contract price of goods sold and proceeds of his

resale, alleging contract to sell to defendant "from 1,500 to 2,000 green salted hides, 30# and up," at a certain price per pound, the words "30# and up" meaning of the weight of thirty pounds and upwards, was not so indefinite as to number, weight, and character of hides as to render contract incapable of legal enforcement. 24 App. 581, 582 (3-a) (101 S. E. 706).

3.

Stated. 16 App. 636, 637 (2) (85 S. E. 943); 17 App. 620 (87 S. E. 904).

Both parties: When possible to do so without contravening any rule of law, courts will construe contract as binding on both the parties, where, from language of contract, conduct of the parties, and all attendant circumstances, it appears that intention of parties was that both should be bound by the

sale, and substantial justice requires that the contract be given effect. 21 App. 160 (3) (93 S. E. 1018); 24 App. 504, 505 (3) (101 S. E. 393).

Party: Construction placed on covenant in lease by parties thereto, as shown by their acts and conduct, is entitled to much weight and may be conclusive upon them. 148/188 (5) (96 S. E. 226).

4.

Insurance policy: Clause conditioning payment on death resulting solely from accidental cause must be construed most favorably to insured so

as to effectuate manifest intent of contracting party. 16 App. 66 (1-a) (85 S. E. 600).

Where insurance policy is capable

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of being construed in two ways, that interpretation must be placed upon it which is most favorable to the insured, especially where other construction

6.

Face of contract: In construing contract, clause written upon its face, inconsistent with one printed upon the back, will generally be accepted as

8.

Bond for title: Petition by obligee in bond for title praying that obligor be enjoined from interfering with his possession and be required to accept balance of price and execute title, it appearing that obligor granted obligee extension of time, held not subject to general demurrer. 142/832 (2) (83 S. E. 957).

Land: Time is not ordinarily of essence of contract for sale of land. 142/344 (3) (82 S. E. 1059).

Notes: Petition here in action on notes was not demurrable because prematurely brought. 18 App. 242 (1) (89 S. E. 459).

Plea in abatement here in action on notes alleging that suit was prematurely brought was demurrable. 18 App. 242 (2) (89 S. E. 459).

Option: Where by terms of option contract optionor obligates himself to sell described lands upon payment of purchase price on day fixed, optionee in order to raise binding promise on part of optionor to sell, must make his election and offer to perform within time stipulated in option contract. 149/147 (99 S. E. 301).

Sale or return: Where contract of sale or return provided that filter and unused disks were to be returned for credit in good condition to seller within thirty-five days from date, if directions for use were followed and

would work a forfeiture. 19 App. 296 (1) (91 S. E. 428). See 22 App. 48 (95 S. E. 379).

expressing intention of parties, rather than inconsistent clause printed upon back. 22 App. 524 (1) (96 S. E. 583).

results obtained were not satisfactory, return should have been made within time expressly limited, and question of reasonable time did not enter. 22 App. 167 (1) (95 S. E. 736).

Timber lease: Where lease contains provision that lessee, its successors, and assigns are to have use of timber upon lands leased, including right to cut and remove same within seven years, after which time lease may be extended by payment of 25 cents per acre per year, it is essential to right of lessee or its assigns that option should be exercised before expiration of term stated in lease or immediately after its expiration, and that amount stipulated as consideration for continuance of lease should be paid. 147/567 (94 S. E. 1008).

Turpentine lease: Under lease granting license to use timber for turpentine purposes, lessees here must commence working within reasonable time, notwithstanding provision that they might enter on work when they desired. 146/363 (91 S. E. 112).

Waiver: Time when of essence of contract notwithstanding this section may be waived. 142/832 (1) (83 S. E. 957).

Insistence by one side of performance after maturity and a part performance accepted by the other is a waiver of time. *Id.*

General Note.

Cited. 24 App. 646 (101 S. E. 815).

Certainty: Sublease providing that lessor should supply gas, heat, steam power, etc., and providing that if he should be unable to procure coal, after reasonable efforts, failure would not render him liable to the lessee,

was sufficiently certain to be basis of suit for damages for breach whereby lessee was deprived of its enjoyment; damages claimed were not too remote or speculative. 148/624 (1) (97 S. E. 678).

Parol promise of deceased to his sis-

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ter, that if she would continue his home as it had been conducted prior to their mother's death, he would make provision sufficient for her to live on the remainder of her life, if sufficiently certain and definite with respect to character of service, amount of compensation, and manner in which compensation was to be made, to constitute contract, is not capable of being enforced, because its terms are too indefinite and uncertain as to length or continuance of service which sister was to render. 149/50 (1) (99 S. E. 31).

Option contract naming number of acres in tract, county and state in which it was situated, and distance from county seat, and by way of further identification describing the land as being "my land of sixty-seven hundred acres, except graveyard of two acres," and giving the numbers of the lots which in whole or in part are included in the tract, was not so vague, uncertain, or indefinite that property could not be identified with aid of extrinsic testimony. 20 App. 653 (1) (93 S. E. 313).

CHAPTER 6.

Of Bills of Exchange and Promissory Notes and Other Negotiable Instruments.

ARTICLE 1.

Of Negotiable Papers and How Transferred.

§ 4269. (§ 3676.) Bill of exchange, parties.

Acceptance: Holder can not sue drawee on promise made to accept existing bill, where promise was made to drawer of bill after it had passed into hands of holder, and where money sued for was paid or advanced by holder before promise was made, and not upon faith of promise. 24 App. 260 (1) (100 S. E. 753).

Consideration: Right to enforce collection of accounts transferred was sufficient consideration for draft given for transfer, when considered with loss of certain prospective labor of debtors, which also formed part of

consideration. 17 App. 395 (2) (87 S. E. 154).

County orders: Where orders issued by commissioner of roads and revenues of county for materials bought were valid, and new orders were issued on understanding that first would be returned, which was not done, holder of new orders for value and without notice has no right of action against the county to enforce their payment. 148/623 (1) (97 S. E. 679).

Tort: Answer in action on note setting up defense predicated on alleged tort was property stricken. 16 App. 388 (1) (85 S. E. 618).

§ 4270. (§ 3677.) Promissory note.

Agent: Petition here setting up notes for price of fertilizer and agreement by defendant to pay for fertilizer sold by him for plaintiff held to show right of recovery in plaintiff. 145/389 (89 S. E. 339).

Amount: Ordinarily, there can be no recovery on promissory note in which

blank for the amount it left in body of instrument, though an amount appears in figures in the margin of the paper. 19 App. 86, 87 (3) (90 S. E. 978).

Where note in which blank for amount is left in body of instrument but which is otherwise an uncondi-

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tional promise to pay is made basis of suit for specified amount, and defendant admits execution of instrument and that obligation thereof was to pay exact sum for, judge, in absence of issuable defense under oath, would be authorized to render judgment as upon an unconditional contract in writing. 19 App. 86, 87 (3-a) (90 S. E. 978).

Bearer and holder are words of similar import, and where either is employed in note, note may be made negotiable by delivery. 15 App. 822, 826 (84 S. E. 312), citing 4 Words & Phrases 3319.

Collateral security: Where paper under seal conveyed land to secure note, agreement for same consideration to pay payee one-fourth of profits of mill amounted merely to pledge of profits as additional security, and remittances were properly credited as payments on note. 145/83, 84 (1) (88 S. E. 545).

Demurrer to declaration on ground that there was no list of collateral securities attached was properly overruled, though note recites that to secure prompt payment thereof there were deposited with bank and pledged to it as collateral security, among other property, "customers' notes as per list," this recital not being equivalent of recital that list was attached to the note or made part thereof. 145/861, 862 (1) (90 S. E. 44).

Consideration: Defendant in an action on a note given for notes intrusted for collection, was not entitled to have credited upon the note the value of the uncollected principal notes in his hands. 141/32 (1) (80 S. E. 306).

Plea that note was without consideration being unsupported by evidence, immaterial whether plaintiff's purchase of the note was before or after maturity. 13 App. 471 (79 S. E. 366).

Consideration of promissory note is always proper subject of inquiry. 13 App. 492 (2) (79 S. E. 359).

Where sole consideration for note was agreement to surrender another note on which defendants were liable, there was no executed accord and satisfaction, and note was unenforceable

for want of consideration. 15 App. 684 (1) (84 S. E. 153).

Extension granted by creditor in taking joint promissory note of defendants for antecedent debt of one of them was sufficient consideration to support promise of other. 23 App. 567 (99 S. E. 42).

Fact that promissory note is under seal will not defeat right of maker or his administrator to plead want of consideration. 23 App. 569 (1) (99 S. E. 57).

Construction: Note and contract given contemporaneously with it, stating consideration and constituting one contract with it, should be construed together. 17 App. 680 (2) (87 S. E. 1099).

Corporation: Note in form, "We promise to pay," etc., "and whether maker, indorser, or surety, severally agree to pay all costs of collection," reciting that it is given under the hand and seal of each party, and signed, on one line, "Spiller-Beall Co. (L.S.)," and directly below on the next line, "R. J. Spiller, Pres.," is the note of the corporation, and is not the joint note of the company and the president thereof. 18 App. 450 (1) (89 S. E. 587).

Definition: Promissory note defined here, in explanation of definition given by this section. 15 App. 822, 825 (84 S. E. 312).

Delivery: Evidence here was insufficient to show delivery of note. 142/658 (83 S. E. 520).

Estoppel: Fact that payees of mortgage note sued upon were purchasers of property at void sale did not amount to rescission of contract between them and makers of note, and did not estop them from bringing suit upon the note. 20 App. 235 (2) (92 S. E. 965).

Evidence: Where in action on joint note plea of non est factum was filed by all defendants, it was competent for defendants to show that though they had agreed to give joint note for certain amount, they had individually given smaller notes equaling such amounts. 143/184 (1) (84 S. E. 443).

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Evidence that certain receipts had been given to defendants by agents of payees of individual notes of defendants was admissible though plaintiff was suing as transferee of a joint note, and not on individual notes. *Id.*

Evidence here was insufficient though circumstantial, when coupled with defendant's admissions, to show execution of note sued on. 17 App. 370 (86 S. E. 1073).

Evidence here in action on notes did not authorize verdict for defendants. 145/383 (1) (89 S. E. 327).

Burden of showing that condition attached to delivery of note and mortgage was breached was not carried by evidence to that effect from only two of the three defendants, since it was necessary that all three defendants should negative presumption that said condition was complied with, especially in view of direct positive evidence on part of plaintiff that plaintiff had complied with said condition. 22 App. 52 (3-b) (95 S. E. 476).

Holder and bearer are words of similar import, and where either is employed in note, note may be made negotiable by delivery. "Holder" is applied to any one in actual or constructive possession of bill, and entitled at law to recover or receive its contents from parties to it. 15 App. 822, 826 (84 S. E. 312), citing 4 Words & Phrases 3319.

Indorsement: Note indorsed in stencil by company, with the added words "by (a named person) pt.," was prima facie admissible in evidence as between maker and transferee in action on note. 143/522 (1) (85 S. E. 699).

Where payee indorses note in blank and delivers it to bank for collection, and thereafter verbally sells interest in it, without delivering it, buyer does not acquire title so as to authorize him to sue payee as indorser on failure of collection. 144/760 (1) (87 S. E. 1027).

Joint maker: If upon production of note in evidence it does not appear on its face whether plaintiff signed as surety or not, it would be compe-

tent to establish that fact by his testimony. 140/790 (1) (79 S. E. 1127).

Makers of note here were joint makers. 144/74 (1) (86 S. E. 249).

Fact that surety had let one joint maker have money for which he received more than legal rate of interest was insufficient to show that lender's relation to paper was that of joint maker with borrower. *Id.* 74 75 (2).

Where several persons sign a promissory note which reads, "We, or either of us, promise to pay," etc., it is a promise to pay jointly and severally, and the legal holder of such a note can, at his pleasure, sue any one of the parties without suing the others. 21 App. 182, 183 (2) (94 S. E. 73, 40 A. B. Rep. 449).

Jury: Where note and attached contract concluded defendant on question of his liability on note, refusal to submit his liability to jury was not error, though evidence that no personal liability was intended was admitted without objection. 146/634 (2) (92 S. E. 56).

Maturity: Stipulation in one of series of notes that it will become due if default is made in payment of any one of the notes is valid. 14 App. 63 (1) (80 S. E. 217).

Name of payee: Note payable to order and issued with a blank for payee's name may be filled up by any bona fide holder with his own name, and it is a good promissory note as to him from its date. 140/398 (2) (78 S. E. 841).

Payment: Plea that note was given for rent of land and that plaintiff, as holder, permitted maker to divert crops, though rent debt was a first lien thereon, and though plaintiff, at time defendant indorsed and transferred note to him, agreed to collect out of crops in year for which land was rented, properly stricken. 13 App. 9 (5) (78 S. E. 682).

Plea: Amended plea here sufficiently charged, in absence of special demurrer and as against general attack that it presented no defense, that note sued on was without consideration, and that plaintiff with knowl-

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edge of such fact conspired with the payee to collect same from the maker. 13 App. 392, 393 (6) (79 S. E. 237).

Presumption: If note is genuine it will be presumed to have been executed on date which it bears. 142/807 (1) (83 S. E. 958).

Read note: One executing and delivering promissory note without reading or knowing its contents can not avoid liability because he acted ignorantly, without showing some justification either by reason of inability to read or by some misleading device amounting to fraud on part of person with whom he was dealing. 23 App. 136 (98 S. E. 239).

Renewal note: Note reciting that it was given for value received and that the makers have pledged as collateral security the original note and security for the same, was not a mere agreement collateral to the original note, extending time for payment and increasing the rate of interest, but was a new note for the amount remaining due in the first note, and the first note was to be held as collateral security for the second. 140/653 (1) (79 S. E. 539).

Bank to which note was indorsed could not, after maturity of second note, sue on the first note and at the same time supplement its terms by applying to it the increased rate of interest specified in the second note. Id. 653 (3).

§ 4273. (§ 3681.) Negotiable notes.

Cited. 15 App. 822, 826 (84 S. E. 312).

Bearer: Note payable to bearer is negotiable by transfer and delivery only. 17 App. 465, 466 (2) (87 S. E. 713).

Blank: Note may be transferred by payee merely signing his name on back thereof; not necessary that name of transferee shall be set out in writing. 140/603 (1-a) (79 S. E. 540).

Title to check indorsed in blank will pass by delivery. 14 App. 238 (80 S. E. 673).

"Cash or order:" Note payable to "cash or order," and indorsed in blank by makers thereof, is in effect payable to bearer, and holder is presumed to be vested with legal title

Ordinarily, purchaser renewing purchase-money note, knowing of defects in property, estopped to set up defects as defense; aliter, where seller promises to repair in consideration of renewal note. 13 App. 52 (78 S. E. 780).

Suit: When promissory note is payable on day certain at a bank, maker has until expiration of banking hours on day of maturity to pay it, but action thereon may be begun thereafter on same day, if demand for payment be made and refused on that day. 18 App. 558 (1) (89 S. E. 109).

Surety: One who signed as surety note previously signed by two others as joint makers contracted as surety for both makers. 144/74 (1) (86 S. E. 249).

Fact that surety had let one joint maker have money for which he received more than legal rate of interest was insufficient to charge him with notice that other joint maker was mere surety. Id. 74, 75 (2).

Whether relationship of promisor to payee is that of joint principal or that of surety is question to be determined by facts, and is not to be governed by opinion that either party to contract might have entertained, so that charge making undisclosed intention and private understanding of defendant test for determining her relationship to notes was error. 24 App. 613, 614 (3) (101 S. E. 696).

and may bring suit against makers and indorsers. 17 App. 465, 466 (2-a) (87 S. E. 713).

Consideration: That consideration is expressed in note does not affect its negotiability unless such consideration is illegal. 16 App. 684 (2) (85 S. E. 973).

Contract: Note which on its face is subject to terms of contract between maker and payee is not negotiable instrument. 20 App. 506, 507 (5) (93 S. E. 157).

Deposit certificate: Instruments signed by bank cashier reciting deposit by certain person, "payable to the order of himself," with interest at six per

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cent. if left twelve months, was negotiable, the quoted words being words of negotiability. 147/637 (1) (95 S. E. 223).

Indorsement on instrument issued by bank which recited that deposit had been made, "For value received, I hereby transfer this certificate" to named person, signed by the depositor, though omitting the words "or order" after name of transferee, was a general indorsement and did not restrict negotiability of paper. 147/637 (2) (95 S. E. 223).

Indorsement: Negotiable promissory note payable to order of named person stands on basis of non-negotiable instrument, until properly indorsed. 148/409 (1) (96 S. E. 866).

Promissory note payable to order of maker and properly indorsed by him is negotiable instrument. 19 App. 118 (1) (91 S. E. 287); 20 App. 402 (1) (93 S. E. 38).

Where one signs as maker note payable to himself, and another signs it as surety only, maker's indorsement converts it into negotiable instrument, and his transfer of note binds the

surety, notwithstanding absence of indorsement by surety. 19 App. 118 (2) (91 S. E. 287).

Promissory note payable to named person is negotiable only by indorsement of that person. 20 App. 153 (1) (92 S. E. 758).

Where note is payable to named person, and after being indorsed by payee is passed to a third person, such taker, by indorsement and not merely by delivery, would be protected by the general rule as to presumption set up in his favor by section 4288. 22 App. 667, 668 (4, 5) (97 S. E. 109); affirmed, 149/88 (99 S. E. 41).

Overdue: Fact that note is overdue does not destroy its character of negotiability. 21 App. 696 (94 S. E. 902).

Words of negotiability: Court properly excluded testimony offered to show that words of negotiability in notes were placed there through mistake on part of makers or by fraud on part of original payee, where there was no testimony tending to show knowledge thereof or fraud on part of holder, in whose name suit was brought. 19 App. 10, 11 (4) (90 S. E. 731).

§ 4274. (§ 3682.) Bonds, etc., negotiable.

Applied. 142/160, 161 (82 S. E. 556).

Dishonor: Fact that overdue and unpaid interest coupons are attached to bond negotiable by delivery does not,

as a matter of law, make bond dishonored paper, or charge taker for value with notice of defense. 144/665, 668 (7) (87 S. E. 897).

§ 4275. (§ 3683.) Limited indorsement.

Express restrictions: Person indorsing or transferring note may limit liability only by express restrictions contained in the indorsement or transfer. 18 App. 420 (1) (89 S. E. 494).

Interest: Holder of negotiable note is presumed to be bona fide purchaser for value, and such holder could main-

tain suit on note against payee signing transfer indorsed thereon, "I hereby transfer my interest in this note to" stated person, the suit being against the original maker and the person so indorsing. 18 App. 420 (2) (89 S. E. 494).

§ 4276. (§ 3684.) Transfer of secured note carries security.

Cited. 15 App. 778, 782 (84 S. E. 222); 17 App. 631, 633 (87 S. E. 918).

Bond for titles: Sections 3345 and 4276 apply to note secured by mortgage and other liens, and do not contemplate purchase money notes which are not so secured, but in connection with

which there is contract reserving title, or bond to convey title on payment of purchase money. 148/27 (1-b) (95 S. E. 690).

Construction: This section should be construed in connection with sections 3345-3347. 140/603, 606 (79 S. E. 540).

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Indorsement without recourse: This section, properly construed, is unrestricted as to manner of transfer; consequently it applies where transfer is by indorsement of note without recourse, as well as where indorsement is not so restricted. 148/27 (1-a) (95 S. E. 690).

Where A sold designated land, made deed to purchaser, and received series of promissory notes for purchase price secured by mortgage on land, and thereafter transferred one note "without recourse" to third person for value, no express transfer having been made of mortgage, and transferee transferred the note in due course, the remote transferee in virtue of indorsements acquired an interest in the mortgage which would authorize him to maintain suit for its foreclosure relatively to the note assigned to him. 148/27, 28 (1-d) (95 S. E. 690).

Where purchase money note secured by mortgage was transferred without recourse to one who transferred to another, and suit was instituted thereon by last transferee to recover general judgment and set up the mortgage lien upon the property, while it was proper, under undisputed facts, to direct verdict setting up mortgage lien on the property for amount of note, it was erroneous to direct general verdict in personam against mortgagee who had transferred note without recourse. 148/27, 28 (2) (95 S. E. 690).

Mortgage: Where mortgage note was indorsed in blank by payee, for value, the note, together with the mortgage lien, was thereby conveyed, and the transferee could foreclose the same in its own name. 140/603 (1) (79 S. E. 540).

Where case is that of transfer of note secured by mortgage, rule that when purchase money notes for land for which bond for title has been given are transferred by vendor without recourse, notes lose their character as purchase money notes in so far as they entitle vendor to any interest in the land, has no application. 148/27 (1-c) (95 S. E. 690).

Transfer of note secured by mortgage conveys to transferee benefit of security, and transfer of note secured by bill of sale carried with it such bill of sale. 18 App. 307 (5) (89 S. E. 382).

Priorities: In absence of agreement or special equity to contrary, assignees holding separately several notes secured by mortgage or otherwise are entitled to share pro rata, and without any preference, in proceeds arising from sale of security, when insufficient to satisfy them all; this is true although notes matured on different dates and the assignments were made at different times. 19 App. 219 (91 S. E. 267).

Where several notes are secured by mortgage or otherwise, and holder of security transfers one note and retains others, transferee has preference over assignor if security is insufficient to pay all notes; equity existing in favor of assignee and against assignor is considered sufficient to create preference in favor of assignee. 19 App. 219, 220 (91 S. E. 267).

Repeal of this section not effected by sections 3345-3347. 140/603, 606 (79 S. E. 540).

Security deed: This section is applicable to security deeds, where title is transferred to mortgagee, so that where deed secured several notes, and one of them was transferred to mortgagee's creditor, latter was entitled to preferred claim out of proceeds of sale of property. 215 Fed. 253.

Title: When purchase money notes are transferred by vendor of land "without recourse" or without guaranty, notes lose character as purchase money notes, in so far as they entitle holder to lien on property. 147/33 (92 S. E. 645).

Charge that when promissory note for purchase money of personal property, which reserves title in payee until note is paid, is by payee transferred for value to third person without recourse, title reserved is divested, and if at time of such transfer title so

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held is not likewise transferred to purchaser of note as security in his hands, it vests in the maker, and transferee

becomes ordinary creditor of such maker, is correct statement of law. 20 App. 820 (1) (93 S. E. 559).

§ 4277. (§ 3685.) **Implied warranty.**

Forged: Indorser of forged bill is liable for consideration which has failed,

without proof of demand. 22 App. 711, 712 (2) (97 S. E. 116).

ARTICLE 2.

Of Indorsers, Notice, and Protest.

§ 4279. (§ 3687.) **Contract of indorser.**

Stated. 147/637, 638 (3) (95 S. E. 223).

Conditions: Where indorser of corporate note before delivery indorsed same on condition that other officers and directors indorse it, breach of such condition was no defense to his liability, in absence of proof of knowledge of condition by payee. 15 App. 26 (82 S. E. 580).

Consideration: Where, although payee may not have been bound to extend time of payment of note, he did so extend time of payment, (suit upon note not being brought until after lapse of extended time of payment), there was consideration which actually flowed to original maker by reason of indorsement, and it was immaterial that indorsers themselves received no benefit. 22 App. 164 (3) (95 S. E. 763).

Where, by agreement with payee in note, indorser was to be paid a consideration of a certain per cent. on all merchandise sold to the maker, mere fact that such per cent. was never paid did not invalidate contract and relieve indorser from liability. 23 App. 609 (99 S. E. 222).

Evidence: Indorsement of note in blank can not be shown to have been intended as an indorsement without recourse. 13 App. 412 (1) (79 S. E. 227).

§ 4280. (§ 3688.) **Protest and notice.**

Dishonor: Under evidence here failure to instruct that note sued on by indorsee, was not dishonored was not error. 142/821 (2) (83 S. E. 961).

Extension of time of payment of note, granted without consideration, does not discharge surety or indorser. 13 App. 412 (2) (79 S. E. 227).

Power of attorney: Where there was indorsed on note and mortgage several names, last of which was "H. A. B. with Power of Attorney," and power of attorney was not included in the record, at most this could only indicate an ordinary individual indorsement. 149/479 (2-a) (100 S. E. 569).

Signature: No particular form of signature is necessary, to formal indorsement of negotiable instrument, and a seal is not necessary. whether the indorsement be that of a private person or of a corporation. 18 App. 764 (1) (90 S. E. 725).

Surety: Contract of suretyship is necessarily included in every unqualified indorsement of negotiable instrument. 15 App. 433 (83 S. E. 673).

Warranty: Indorsement of promissory note is warranty to every subsequent holder in good faith that the instrument and all antecedent signatures are genuine; and even where prior signature is forgery, indorser is at once liable upon his warranty to subsequent holders, without any presentment for payment or notice of non-payment. 22 App. 711, 712 (2) (97 S. E. 116).

Jury: There is no merit in contention that court erred in not submitting to jury question whether bank, which defendant contended was real maker of

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note, had waived protest on note sued on, it appearing that no notice of non-payment or of protest for non-payment had been given the bank. 19 App. 434 (2) (91 S. E. 509).

Maker: Where director indorsed note before delivery to take up existing note for corporation's debt, he signed indirectly for his own benefit and was therefore quasi-maker, and not entitled to notice of dishonor. 15 App. 26 (82 S. E. 580).

Judgment in action against prior indorsers and maker of note containing no waiver of notice or of protest, and no issuable defense being filed under oath, rendered without intervention of jury, was valid as to the maker. 145/164, 165 (4) (88 S. E. 951).

Principal: Notice of non-payment or protest is not necessary to bind principal on note; it is given only for purpose of fixing liability upon an in-

dorser or surety. 19 App. 434 (2) (91 S. E. 509).

Proof of notice: Charge that under Florida statute pleaded as defense to note in suit burden was on defendant to show that notice of dishonor was not given to him, and that mailing of notice within time required by statute would be sufficient was error, as under such statute burden was on plaintiff to show notice to defendant. 24 App. 91 (2) (100 S. E. 42).

Uncontradicted testimony of defendant that notice of dishonor was never received by him being sufficient proof under Florida law, charge placing burden on defendant to show want of notice of dishonor was objectionable as conveying impression that he must also prove that such notice was never mailed to him in compliance with such law. 24 App. 91 (2) (100 S. E. 42).

§ 4283. (§ 3691.) Indorser sued with maker.

Jurisdiction: Joint obligors and joint promisors residing in different counties may be sued in county of either; maker and surety on note are joint and several promisors. 18 App. 387 (2) (89 S. E. 525).

Creditor holding promissory note may sue maker and sureties in county of residence of either, and surety pay-

ing note succeeds to this right and may sue upon note either in county of residence of maker or in that of residence of co-surety, at his option. 18 App. 387 (3) (89 S. E. 525).

Petition in action on note here stated cause of action against both maker and indorser. 17 App. 590, 591 (2) 87 S. E. 843).

ARTICLE 3.

Of the Rights of Holders.

§ 4286. (§ 3694.) Right of bona fide holder.

Cited. 142/821, 828 (83 S. E. 961); 145/551, 557 (89 S. E. 578); 18 App. 764 (2) (92 S. E. 725).

Stated. 15 App. 822 (1) (84 S. E. 312); 16 App. 95 (1) (84 S. E. 591).

Accommodation paper: Testimony of maker of note sued on that he signed merely as accommodation maker, without filling in certain blanks and subject to certain conditions, did not constitute good defense against bona fide transferee for value before maturity. 17 App. 170 (1) (86 S. E. 434).

Admission: Where counsel for plaintiff stated in brief that they admitted on trial that plaintiff was not bona fide purchaser, without notice, before maturity, of note, sued on, plaintiff will not be considered as innocent purchaser of note. 22 App. 164 (1) (95 S. E. 763).

Agreement: Transferee of negotiable paper who receives it before it is due can not be affected by any agreement or understanding between other parties to the paper, unless notice of such

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agreement or understanding is brought home to the transferee. 22 App. 514 (3) (96 S. E. 450).

Knowledge on part of holder of negotiable note that it was given in consideration of executory contract or based upon executory agreement with payee, even though such consideration or agreement should be expressed in the agreement itself, will not deprive indorsee of character of bona fide holder, unless he had notice of breach of such agreement by payee. 22 App. 519 (1) (96 S. E. 452).

Transferee of negotiable paper who receives it before it is due can not be affected by any agreement or understanding between other parties to the paper, unless notice of such agreement or understanding is brought home to the transferee. 24 App. 807, 808 (2) (102 S. E. 375).

Answer: Demurrer to defendant's amended answer here in action on note, setting up that plaintiff was not a bona fide holder for value, was properly overruled. 145/551 (1) (89 S. E. 578).

Blank: One who signs his name to blank paper and entrusts signature to another, with authority to incorporate above signature a promissory note, or one who signs instrument in form of negotiable promise to pay, in which are left spaces manifestly indicating that instrument is incomplete until they shall be filled out, is liable to one who in due course and by valid indorsement becomes bona fide holder, according to actual tenor and effect, although person to whom it was intrusted violated his trust and exceeded his authority in writing or completing the obligation. 21 App. 642 (3) (94 S. E. 853).

If note in form of negotiable instrument is signed in blank, with spaces left which could easily be filled out without exciting suspicion, and, while in such incomplete form and prior to any actual delivery, it is feloniously taken from possession of maker and completed, it does not follow that instrument becomes valid obligation even in hands of bona fide holder for value; question of liability should be determined by reference to whether or not negligence of maker in permitting in-

strument to get into circulation constituted proximate cause of the fraud, such as would estop him from denying valid delivery. 21 App. 624, 625 (4) (94 S. E. 853).

Testimony of one whose name appears as maker of negotiable instrument, that he signed and delivered it without filling various blanks therein, and with understanding that blanks would not be filled until he should consent to completion of instrument and its use, and that thereafter, without his knowledge or consent, blanks were filled in, would not support plea of non est factum, or constitute valid defense against bona fide transferee for value and before maturity. 24 App. 807 (1) (102 S. E. 375).

Burden of proof: Upon filing of plea of non est factum as to indorsement of note, burden is upon plaintiff to establish, by preponderance of evidence, the fact of the indorsement. 20 App. 153 (3) (92 S. E. 758).

Consideration: Mere fact that indorsee knew that note was given to payee for real estate commission did not put him on notice or inquiry as to whether consideration failed. 143/623 (3) (85 S. E. 858).

Where payee of note, payable to order, sold and delivered it before maturity, without indorsement or written assignment, makers, in action by holder, may set up failure of consideration available against payee. 144/233 (1) (86 S. E. 1093).

Bona fide holder of negotiable note purchased for value and before maturity is protected against defense that note was without consideration. 13 App. 35 (3) (78 S. E. 772).

Where plaintiff was not bona fide purchaser before maturity of notes sued on, error to exclude defendant's evidence that consideration for notes had partially failed. 13 App. 492 (2) (79 S. E. 359).

Bona fide holder of notes before maturity is not chargeable with failure of consideration. 16 App. 684 (85 S. E. 973).

That consideration of note is realty rather than personalty does not change rule that purchaser is not affected by

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knowledge of consideration. *Id.* 684, 685 (3).

Note given in consideration of contract, making of which constitutes crime, is void, even in hands of innocent purchaser for value, before due, and without notice of defenses. 17 App. 649 (1) (87 S. E. 1101).

Notice of probable failure of consideration, such as may be pleaded against holder of note, may be either express or implied. 17 App. 680 (2) 87 S. E. 1099).

Character and sufficiency of circumstances to place prudent man on guard as to failure of consideration of note purchased are questions of fact. *Id.*

Failure of consideration is no defense as against bona fide holder of negotiable note, where he receives same before due for value. 17 App. 692 (1) (87 S. E. 1098).

Memorandum on note reciting that note was given for certain shares of stock, with guaranty of certain annual dividend, was sufficient to give purchaser notice of failure of consideration. 145/494 (1) (89 S. E. 613).

Where owner of house and lot sells same to one who intends to use it for purpose of maintaining it as a house of prostitution, and the vendor knows purpose for which it is bought, and use for which it is to be put, notes taken for purchase money will be based upon illegal and immoral consideration, and will be unenforceable in hands of first taker or his transferee. 149/72 (2) (99 S. E. 121); 23 App. 724 (99 S. E. 387).

Plea of failure of consideration can not be sustained as against bona fide holder of note and for value unless evidence shows that holder had notice of such failure of consideration, or that facts and circumstances were sufficient to put reasonably prudent person on guard. 18 App. 450, 451 (8) (89 S. E. 587).

While holder of negotiable promissory note may know nature and character of consideration, it is essential that failure of consideration be known to him, or that facts and circumstances be sufficient to put him, as a reasonably prudent man, upon notice that there was failure of consideration, and

burden is on defendant setting up such a plea. *Id.*

Payee of accepted bill, who has paid value to drawer before maturity, is not concerned with consideration as between drawer and acceptor; he holds bill unaffected by equities in favor of acceptor against drawer. 23 App. 279 (1) (98 S. E. 122).

Corporation: Every trading corporation, unless forbidden by charter, may issue negotiable paper in due and ordinary course of business; and where corporation having this power makes or indorses such paper, although for unauthorized purpose, defense of ultra vires will not avail it as against innocent purchaser who bona fide and for value acquires title to paper before maturity. 20 App. 436 (1) (93 S. E. 108).

Damages: Where negotiable note is wrongfully transferred to bona fide purchaser, cutting off valid defense of maker, cause of action arises for resulting damages. 15 App. 680 (1) (84 S. E. 163).

Defenses: Promissory note payable to order of maker and properly indorsed by him is negotiable instrument, and holder is protected from any defense set up by maker, acceptor or indorser, except non est factum, gambling or immoral and illegal consideration, or fraud in its procurement by the holder. 20 App. 402 (1) (93 S. E. 38).

Direction of verdict: Where testimony tended to show that note was transferred by payee to plaintiff's husband, and that if plaintiff ever became holder at all, it was after maturity, and tended also to sustain plea of failure of consideration filed by payee, court erred in directing verdict as to payee. 22 App. 160 (2) (95 S. E. 742).

Evidence: Where undisputed evidence showed that plaintiff was bona fide holder for value, without notice of any defense to note sued on, evidence of any aliunde contract between maker and original payee could not affect rights of such holder. 18 App. 263 (1) (89 S. E. 450).

Where evidence in suit on defendant's note to a bank, which by indorsement had transferred it to plaintiff bank, authorized finding that note was

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so indorsed and transferred before maturity, and remained thereafter in possession of plaintiff, and that plaintiff was bona fide holder for value, and that defendant's plea of payment was not sustained by proof, verdict for plaintiff for full amount sued for was supported by evidence. 19 App. 433 (1) (91 S. E. 439).

Where note showing that it was transferred to plaintiff for value and before maturity is sued on by transferee and holder, its production by plaintiff at trial is prima facie evidence that he acquired it for value, before maturity, and without notice of any fact going to defeat its collection. 20 App. 489 (2) (93 S. E. 110).

Felonious taking: Where negotiable instrument is completed in form and duly signed, but prior to its delivery is feloniously taken by the payee, and prior to its maturity is indorsed and passed by such unlawful taker to a bona fide holder for value, the innocent purchaser is protected in his title and can recover against the maker. 22 App. 667 (1) (97 S. E. 109); affirmed, 149/88 (99 S. E. 41).

Fraud: Evidence here in indorsee's action on note defended for fraud and failure of consideration sustained verdict for defendant. 142/821 (2) (83 S. E. 961).

Plea setting up fraud, but not stating that purchaser was induced to sign note by false representations as to its contents or that he was excused from ascertaining the same was properly stricken. 142/836 (2) (83 S. E. 958).

Fraud which will enable maker to avoid paying note in hands of innocent purchaser for value is fraud on part of holder. 15 App. 822, 826 (84 S. E. 312).

Court did not err in excluding testimony offered to show that note sued on was obtained by fraud, where such testimony did not connect or tend to connect holder of note with alleged fraud. 19 App. 335 (1) (91 S. E. 440).

Fraud in procurement: The "fraud in the procurement of the note" which will let in defenses against the holder is the fraud on his part, and has no reference to fraud in the contract out

of which the instrument arose. 18 App. 171 (1-a) (88 S. E. 991).

"Fraud in the procurement" of a note refers not to fraud in original procurement of paper, but only to fraud on part of holder in obtaining the note. 18 App. 181 (89 S. E. 379).

Fraud in procurement of note must be fraud on part of holder, in order to avail as legal defense. 19 App. 10, 11 (4) (90 S. E. 731).

"Fraud in its procurement" which would enable maker of promissory note to avoid paying it, when in hands of innocent holder for value, means fraud on part of holder, and has no reference to fraud in contract out of which instrument arose. 20 App. 402 (1-a) (93 S. E. 38).

"Fraud in the procurement of the note," means fraud on the part of the holder thereof, and has no reference to the fraud in the contract out of which the note arose, or fraud of an intervening indorser. 22 App. 667 (2) (97 S. E. 109); affirmed, 149/88 (99 S. E. 41).

Guaranty: Where note, payable to order, was transferred without indorsement or written assignment, that third person guaranteed payment without knowledge or consent of makers, does not affect makers' liability, or deprive them of defenses available against payee and holder, whose title was equitable. 144/233 (2) (86 S. E. 1093).

Guardian: Under this section and section 4291, one buying municipal or State bonds from guardian at private sale, without court order, after notice that bonds belong to estate, is liable to ward for such bonds, if their proceeds are misappropriated by guardian. 16 App. 559 (2) (85 S. E. 766).

Indorsement: Payee of promissory note may plead and prove, in defense to suit by bona fide holder of note for value, who received it before maturity and without notice of any defect or defense, that he did not indorse or authorize the indorsement of his name on the back of the instrument. 20 App. 153 (2) (92 S. E. 758).

Maturity: Plea that note was without consideration being unsupported by

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evidence, immaterial whether plaintiff's purchase of the note was before or after maturity. 13 App. 471 (79 S. E. 366).

Evidence authorizing inference that plaintiff acquired title to note after maturity authorized finding that he was not bona fide purchaser. 16 App. 23 (84 S. E. 483).

Non est factum: Defense of non est factum can be successfully pleaded to suit on negotiable promise to pay, even as against bona fide holder who took it prior to maturity and without notice of such defense. 21 App. 624 (2) (94 S. E. 853).

Non-negotiable note: Where one holds non-negotiable note containing language which would place prudent man upon his guard, maker of such note could, as against holder, make all defenses which would have been open to him against payee. 147/170 (2) (93 S. E. 91).

Notice: Fact that transferee, a banker, knew payee of note as customer of bank, and sued maker without joining indorser, and that he had not taken formal transfer of land conveyed as security, did not charge him with notice of failure of consideration, or put him on inquiry. 143/366 (1) (85 S. E. 101).

Evidence here was sufficient to authorize charge on subject of notice to plaintiff of failure of consideration of notes when he became holder thereof. 144/416, 417 (3) (87 S. E. 466).

Note executed by president of railroad corporation in excess of corporate powers was not enforceable by bank which took it with full notice of unauthorized purposes for which it was given. 16 App. 425 (85 S. E. 634).

Mere fact that president of company negotiated note for his own personal benefit to a third person who knew he was such president would not of itself be notice to such person that this action of the president was unauthorized or improper, nor would such fact be sufficient, without more, to put such third person upon inquiry as to legality or correctness of president's

conduct. 18 App. 450, 452 (9) (89 S. E. 587).

Presumptively, transferee of note given for sum payable on named day but providing that it might be paid in stated monthly installments beginning on that day, some of which extended beyond time of transfer and none of which appeared to be in arrears at that time, acquired it without notice of failure of consideration. 22 App. 397 (1) (95 S. E. 1002).

Charge that if jury believe from evidence that plaintiff knew all about transaction, and that he is not bona fide holder of note for value without notice, but that he had actual notice of all matters that defendant contends to be a failure of consideration, and that he knew note was not binding until bond for title was returned, and that all these matters were known to him at time he purchased note, even though he purchase it before due, then he would not be entitled to recover, read in connection with whole charge, was not erroneous. 23 App. 663 (4) (99 S. E. 224).

Failure of executory consideration in promissory note is not defense against purchaser for value before maturity who had knowledge of character of consideration but who acquired note before consideration had actually failed, and who had notice, constructive or otherwise, that consideration would fail. 24 App. 298 (100 S. E. 647).

In suit upon note by transferee, where defendant admits prima facie case and assumes burden of proving defense that plaintiff purchased note with notice of an infirmity therein, trial judge did not err in directing verdict for plaintiff upon failure of devidence to disclose any fact or circumstance within knowledge of plaintiff prior to purchase of note which would put prudent man on guard as to any defense which defendant might have had against payee. 24 App. 609 (1) (101 S. E. 715), 635 (101 S. E. 756).

See **Consideration.**

Payment: As against plaintiff in action on note which itself shows that it was transferred for value and before ma-

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turity, payment to payee before maturity will not be defense, without showing that payee had possession of note at the time, or was then owner of it, or for some other reason had right to receive the money. 20 App. 489 (2) (93 S. E. 110).

Bona fide holder of negotiable note purchased for value and before maturity is protected against defense that amount of note has been paid to original payee. 21 App. 480 (1) (94 S. E. 616).

Petition: Where plaintiff was bona fide holder for value, without notice of any defense to note sued on, it was not necessary for his petition to allege from whom note sued on was purchased, especially in absence of demurrer. 18 App. 263 (2) (89 S. E. 450).

Pleas: Finding for plaintiff in action on note was unauthorized, where evidence failed to show that plaintiff successfully carried burden placed on him by filing of plea of non est factum. 17 App. 453 (87 S. E. 690).

Special plea in action by holder of note as transferee setting up that defendant was induced to sign by fraud of payee, that note was without consideration, and that plaintiff took note with notice of such fraud and failure of consideration, not subject to demurrer. 145/110 (1) (88 S. E. 570).

Plea which did not allege knowledge on part of holder, at time it obtained the note, that fraud had been practiced upon maker in procuring execution thereof was demurrable. 20 App. 402 (1-b, 2) (93 S. E. 38).

Prosecution for crime: Where defendants in action on note pleaded illegal consideration and invalidity, because given for purpose of suppressing criminal prosecution against one of them, testimony as to statements by him to other defendants that he had violated the law and that he was going to be prosecuted unless they executed a note with him was admissible to explain their conduct in signing the note, but not as proof that a criminal prosecution was threatened. 19 App. 208 (1) (91 S. E. 346).

Whether consideration of note was suppression of threatened prosecution

was purely question of fact for jury, under appropriate instruction from court. 19 App. 208 (2) (91 S. E. 346).

Proof that maker of note was cashier in national bank and violated section 5209 of the Revised Statutes of the United States, that prosecution for such violation was threatened, and that he, his mother, and his brother-in-law signed the note for purpose of suppressing and settling the threatened criminal prosecution, voids the contract. 19 App. 208 (3) (91 S. E. 346).

Where, in action on note, it was contended that such note was given for purpose of suppressing criminal prosecution, charge that it was contended that defendant violated section 5209 of the Revised Statutes of the United States, that there would have to be a violation of some law before there would be suppression of prosecution, etc., was not misleading nor did it in effect charge that jury should find for defendant. 19 App. 208 (4) (91 S. E. 346).

Where consideration for notes sued on was suppression of criminal prosecution, it is immaterial whether suit is brought by bona fide holder or not. 22 App. 433 (2) (96 S. E. 269).

Ratification: Evidence that maker of note signed in blank accepted from payee note to indemnify himself against loss on note signed by him and used by payee without authority was admissible, as tending to show ratification of act of person entrusted with incomplete note. 17 App. 170, 171 (2) (86 S. E. 434).

Seal: Where evidence for plaintiff made out prima facie case for admitting in evidence note sued on, and note was instrument under seal, defendant could plead non est factum, gambling, illegal or immoral consideration, or fraud in its procurement. 18 App. 450, 451 (7) 89 S. E. 587).

Surety: One who signs or indorses note as surety can not in defense to action thereon, either by innocent payee or any other bona fide holder for value, set up that principal maker, to whom he intrusted note, delivered it in violation of condition that certain other person or persons should first sign or

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indorse it. 20 App. 576 (3) (93 S. E. 173).

Usury: Defense of usury is good even against bona fide holder for value of negotiable promissory note, who acquired title to same before its maturity. 21 App. 818 (2) (95 S. E. 331).

§ 4287. (§ 3695.) **Overdue notice.**

Cited. 142/821, 829 (83 S. E. 961); 144/665, 668 (87 S. E. 897).

Notice: If holder of negotiable instrument receives it after it is due, its non-payment at maturity is notice to him of dishonor, and he takes it subject to all the equities existing between the original parties thereto, arising out of and connected with the original contract. 21 App. 696 (94 S. E. 902).

§ 4288. (§ 3696.) **Presumption of good faith.**

Cited., 145/551, 557 (89 S. E. 578); 18 App. 764 (1-b) (90 S. E. 725).

Stated and applied. 143/623 (2) (85 S. E. 858); 144/91 (1) (86 S. E. 233); 15 App. 822 (1) (84 S. E. 312); 17 App. 170, 177 (86 S. E. 434); 18 App. 59 (1) (88 S. E. 794), 420 (2) (89 S. E. 494); 20 App. 396 (2) (93 S. E. 43), 402 (1) (93 S. E. 38), 489 (3) (93 S. E. 110); 22 App. 58 (1) (95 S. E. 378); 147/637, 638 (5) (95 S. E. 223).

Burden: Where defendant in suit brought by holder of promissory note pleads that note is without consideration, burden is on defendant to sustain such plea. 18 App. 450, 451 (4) (89 S. E. 587).

Defendant in action on notes, who admits their execution but denies that plaintiff was bona fide purchaser and alleges total failure of consideration and that if plaintiff did buy notes it knew of failure of consideration at time, has burden to sustain such allegations of his plea. 20 App. 493 (2) (93 S. E. 107).

Possession alone of a security negotiable by delivery before due is presumptive evidence of title thereto, but when such security is proven to have been stolen or otherwise appropriated in fraud of rights of the owner, then the onus is upon the possessor to show

As against bona fide holder who purchases before due, for value and without notice, maker of promissory note can insist upon invalidity of home-stead waiver embraced in usurious contract in hands of such holder. 21 App. 818 (2-a) (95 S. E. 331).

Several notes: Charge that if commercial paper, consisting of series of notes constituting one transaction, was transferred to named person, and certain of these notes were past due at time of transfer, transferee was not holder bona fide and for value, but took entire series as dishonored paper, was substantially correct. 147/377 (1) (94 S. E. 228).

that he took it bona fide and for value. 22 App. 667, 668 (3) (97 S. E. 109); affirmed, 149/88 (99 S. E. 41).

Collaterals: One holding note as collateral security is "holder," within this section. 16 App. 802 (86 S. E. 391).

Consideration: In the absence of evidence of failure of consideration, error for court to charge on subject. 140/594 (5) (79 S. E. 459).

Date: Where note payable at future date is indorsed by payee to another, presumption that such other took note before maturity, for value, and without notice. 13 App. 35 (3) (78 S. E. 772).

Defense: Holder of negotiable note is presumed to be bona fide owner thereof, and for value, and unless defendant negatives one or both of these facts, he is shut off from any defense which he might have against the payee. 18 App. 450 (3) (89 S. E. 578).

Direction of verdict: Only defense to note being denial of allegation that plaintiff was good faith purchaser for value and before maturity, not error to direct verdict for plaintiff in absence of evidence to sustain plea, on introduction of note in evidence showing transfer to plaintiff regularly written thereon by payee. 13 App. 35 (4) (78 S. E. 772).

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Error in directing verdict for principal of notes sued on and interest was harmless, in view of this section, where plaintiff introduced note and no defense was presented. 15 App. 650 (1) (84 S. E. 151).

Where there was no evidence to rebut presumption that holder was bona fide holder for value, but contradicted testimony of president of plaintiff bank was that bank bought note before it was due, with no knowledge of circumstances under which defendant's indorsement was obtained, and undisputed evidence also explicitly denied that person who obtained indorsement had authority for bank in taking note, court did not err in directing verdict for plaintiff. 18 App. 171 (1) (88 S. E. 991).

Where there was no testimony which tended to rebut presumption created by law in behalf of holder of negotiable instrument, court did not err in directing verdict for plaintiff, by whom notes sued upon were apparently obtained from original payee before maturity and for value, without notice of any defect or defense. 19 App. 10 (3) (90 S. E. 731).

Discounted: Petition in action on note made by defendant and payable to other defendants, alleging that it was "discounted or sold" by maker to petitioner before maturity, word "discounted" has meaning synonymous with word "sold," and in such case purchaser need not state price paid therefor. 24 App. 400, 401 (1) (100 S. E. 758).

Where negotiable promissory note, due at fixed date in future, and indorsed by payee in blank, is put in suit by third person, production of note by plaintiff at trial is prima facie evidence that he acquired it for value before maturity, and without notice of any fact going to defeat its collection; as against him payment made to payee will not be defense, without showing that payee had possession of note at time, or was then the owner of it, or some other reason had a right to receive the money. 22 App. 237 (95 S. E. 759).

Fraud in procurement of notes must be fraud in its procurement by holder

thereof; section does not refer to fraud in contract out of which note arises. 17 App. 692 (1) (87 S. E. 1098).

See notes to § 4286, catchword **Fraud in procurement**.

Indorsements: Where plaintiff sues as transferee of note, and then shows in evidence the note with the transfer regularly written thereon, he does not have burden of proving execution of indorsement, unless defendant has filed plea of non est factum as to such indorsement. 18 App. 450 (3) (89 S. E. 587).

Where negotiable note payable at future date is indorsed by payee to plaintiff, in absence of proof to contrary law will presume that plaintiff took note before maturity, for value, and without notice. 21 App. 480 (1) (94 S. E. 616).

Where note is payable to named person, and after being indorsed by payee is passed to a third person, such taker, by indorsement and not merely by delivery, would be protected by the general rule as to presumption set up in his favor. 22 App. 667, 668 (5) (97 S. E. 109); affirmed, 149/88 (99 S. E. 41).

Where suit against maker of note originally payable to his own order and indorsed by him in blank was brought by corporation entitled "The Cosmopolitan Life Insurance Company," to which company it was indorsed in name of another corporation by insurance commissioner, signing thus: "Cosmopolitan Insurance Company, by Wm. A. Wright, Ins. Com'r, State of Georgia, in charge," plaintiff was entitled to benefit of presumption that it was bona fide purchaser, before maturity, without notice of defense set up by maker's plea of failure of consideration. 23 App. 216 (1) (98 S. E. 124).

Notice: Presumption of notice arising from testimony of maker that he notified holder not to trade for note by mailing letter addressed to holder, rebutted by uncontradicted testimony of holder that he did not receive letter. 17 App. 692 (2) (87 S. E. 1098).

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Petition: Where necessary meaning of petition, in suit on note made by defendant and payable to other defendants, was that plaintiff became owner and holder of note before maturity, transaction is presumed to have been bona fide and for value. 24 App. 400, 401 (1) (100 S. E. 758).

Rebut presumption: Presumption that holder is such bona fide not overcome because note was not indorsed by person from whom holder obtained it, or because plaintiff and such person and defendant resided in different States, or because note was taken without collateral mentioned on its face as having been given. 144/514 (87 S. E. 675).

Bank which is transferee of negotiable instrument sued on is presumably the bona fide purchaser of the same for value and before maturity;

§ 4289. (§ 3697.) **Holder of collaterals.**

Cited. 144/587, 594 (87 S. E. 799).

Amount: Where, in action on note given as collateral, evidence of amount due on principal indebtedness is contradictory, determination thereof is for jury. 15 App. 671 (1) (84 S. E. 175).

Holder of accommodation paper received as collateral will be presumed to have advanced full amount of paper, or to hold against transferor claim equal to, or in excess of, such paper. 17 App. 170, 171 (4) (86 S. E. 434).

Holder can recover no more than consideration actually advanced for debt due him from person for whose obligation he accepted collateral. *Id.*

Extent of recovery of one who has acquired as collateral note to which there is valid defense against transferor is limited to amount of debt secured. *Id.*

Where holder of negotiable note, who has received it from payee as collateral security, sues maker, if latter has valid defense against original payee he can by appropriate plea set it up, and if it be sustained, holder can recover no more than debt which collateral secured; presumption is that secured debt is sufficient to consume

and it was for jury to say whether this presumption was rebutted by evidence adduced upon the trial. 18 App. 788 (3) (90 S. E. 1039).

Promissory note payable to order of maker and properly indorsed by him is a negotiable instrument, and holder is presumed to be such bona fide and for value; this presumption is not overcome by proof made of declarations of payee thereof, whether made before or after maturity, where, on trial of action brought by holder, such declarations are admitted, even without objection, to show that plaintiff was not bona fide holder, for value, before maturity, it not further appearing that such declarations were made to plaintiff, or that latter had any knowledge thereof before acquiring title to note. 21 App. 43 (1) (93 S. E. 524).

collateral, and onus of pleading and proving less amount and maker's equity against original payee is on defendant. 18 App. 515 (2) (89 S. E. 1051).

Where, after allowing reduction on note, claimed by defendant on account of alleged failure of consideration, there was evidence from which jury could find that remaining unpaid balance of indebtedness specifically secured by note was less than amount of recovery in favor of transferee holding note as collateral, onus of pleading and proving that a less amount than amount of verdict rendered in favor of transferee was due by original payee to such transferee was sufficiently carried. 18 App. 515, 516 (2-a) (89 S. E. 1051).

Where indorsee holds notes as collateral security for debt due from payee, and there would be valid defense against them if not indorsed, he can recover no more on them than the amount of the debt for which they are collateral; it was therefore error to exclude evidence to prove that part of defendants' plea alleging that note was executed without consideration in so far as payee was considered, and for sole purpose of enabling

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payee to indorse it to plaintiff as collateral security, and that debt thus secured had been fully paid. 21 App. 741, 742 (8) (95 S. E. 19).

The holder of a paper obtained as collateral security may recover only the amount of the debt secured, where the maker has a valid defense against the original payee, and in such case the transferee is entitled to stand upon a better footing than the original payee only pro tanto. 22 App. 223, 229 (95 S. E. 724).

In the absence of proof to the contrary it will be presumed that the debt due transferee and secured by collateral paper he holds is equal to or exceeds the amount of the security. 22 App. 223, 229 (95 S. E. 724).

Collecting agent: Where plaintiff as administratrix held certificate of bank deposit as collateral for debt owed by immediate indorser, refusal to charge on basis that plaintiff was mere collecting agent for indorser was not error. 147/637, 638 (6) (95 S. E. 223).

Consideration: One taking as collateral a purchase-money note with knowledge as to what constitutes its consideration is not permitted to set the sale aside and at the same time recover on the note the purchase-money of the sale. 21 App. 526 (1) (94 S. E. 829).

In order for above rule to preclude recovery on note, it must appear that holder has actually repudiated sale by adopting remedy inconsistent with its validity. *Id.* 526 (2).

Fact that collateral holder of purchase-money note which he took with knowledge that it had been given for "purchase price of an undivided half interest in a stock of goods, wares, merchandise" may have subsequently levied on and sold the stock as the sole property of the original owner does not of itself necessarily show that the sale was thereby repudiated and set aside. *Id.*

Defenses: Where holder of negotiable note, transferred as security for pre-existing debt, sues maker, latter may set up defense against original payee, and, if it be sustained, holder can recover no more than debt secured. 143/366 (3) (85 S. E. 101).

Enforcement: Holder has same right to possession of collateral as purchaser—same right to enforce it; but right to enforce it is only to extent of amount of debt of holder of collateral against pledgor, where maker has valid defense against original payee. 144/761, 767 (87 S. E. 1083).

Evidence: Defendant in action on note transferred as security for pre-existing debt, who sets up defense and claims that secured debt is less than collateral, must prove such claim. 143/366 (3) (85 S. E. 101).

Marshaling securities: Equitable remedy of marshaling securities will not be so extended as to delay or inconvenience creditor in collection of debt secured by collateral notes, by confining him to particular collaterals at instance of one whose note is included among the collaterals and who claims equitable set-off against payee of his note. 147/96 (2) (92 S. E. 879).

Notice: Transferee, who received note from payee before maturity as collateral security for pre-existing debt, without notice of equities between maker and payee, was bona fide holder. 143/366 (2) (85 S. E. 101).

Holder of note for value, who received it from her immediate indorser after demand had been made for payment by payee, was unaffected by parol agreement between payee named and his immediate indorser as to payee's liability, where there was no notice of such agreement or of any demand for payment and its refusal. 147/637, 638 (7) (95 S. E. 223).

Payment: If note, before maturity, is pledged as collateral security for debt which is afterwards paid, holder of note has then no right to collect it, if person liable for payment has already paid it to pledgor who was original payee; so long as portion of debt secured remains unpaid, holder of collateral may collect same, or at least enough thereof to satisfy whatever may remain due. 19 App. 434, 435 (4) (91 S. E. 509).

Payment made before maturity to payee of note sued on was not a legal defense as against bank, bona fide holder, which had received note be-

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fore maturity, as collateral security. 22 App. 33 (95 S. E. 307).

Security: One holding a negotiable instrument transferred as collateral security for a debt is as fully protected as if the holder had purchased the note outright. 22 App. 223, 229 (95 S. E. 724).

§ 4290. (§ 3698.) Title not to be inquired into.

Stated and applied. 16 App. 262 (1) (85 S. E. 201); 17 App. 465 (1) (87 S. E. 713); 24 App. 302 (1) (100 S. E. 731).

Bearer: Person in possession of note payable to bearer is presumed to be owner thereof, until contrary appears; burden of rebutting presumption is upon party claiming adversely to party in possession, and issue as to ownership is question of fact for jury. 22 App. 366 (1) (95 S. E. 1005).

Charge: Refusal of charge as to defendants' right to inquire into plaintiff's title to note sued on here was not error. 16 App. 802 (86 S. E. 391).

Direction of verdict: Where maker of note set up no defense and showed no reason why, for his protection or to let in any defense, he should be permitted to inquire into title to the note, court did not err in directing verdict as to him. 22 App. 160 (1) (95 S. E. 742).

Indorsement: Maker of note payable to his own order and indorsed in blank can inquire into title of bank suing thereon but holding without indorsement by intermediate holders. 145/551 (2) (89 S. E. 578).

Fact that one who is in possession of promissory note has placed upon it indorsement making it payable to another, which remains uncanceled, does not of itself show that title to note has passed out of the holder. 18 App. 536 (89 S. E. 1050).

Note: In view of this section, not error to strike amendment which set up new facts and defense of which no notice was given by original answer, and which was not verified or accompanied by affidavit as required by section 5640. 16 App. 385 (1) (85 S. E. 615).

Value: One taking negotiable paper as collateral security is holder for value, and, if not chargeable with notice of equities, is as much entitled to protection as one who has paid money consideration. 15 App. 680 (2) 84 S. E. 163).

Payment: Maker of note here could inquire into title of bank for purpose of setting up as defense that note was property of original holder, and that bank was not bona fide taker for value, where maker had paid note before maturity to one representing that it was in possession of company to which he had offered it as payment conditionally, and who agreed to indemnify the maker. 145/551 (2) (89 S. E. 578).

Payment of negotiable promissory note to supposed transferee holding it by virtue of forged indorsement will not protect maker against payment to true owner, and consequently maker, when sued by alleged transferee, may avail himself of defense that alleged transfer by payee was not genuine. 146/282, 283 (2-a) (91 S. E. 88).

Pleading: Answer in suit by transferee of negotiable promissory note against maker and indorser that defendant denies second paragraph of plaintiff's petition, which paragraph alleged that defendants were indebted to petitioner as owner and holder, before maturity, of described note, executed by said maker, and indorsed by payee, "said note being now held and owned by your petitioner," was in substance a denial of the genuineness of the alleged transfer. 146/282, 283 (3) (91 S. E. 88).

Amended plea in suit on due-bill striking paragraph of original answer wherein it was alleged that plaintiff was the legal holder of such due-bill, and further asserting that plaintiff was not the holder or owner at time it was sued on, but same was owned by another named person, it having been sold and indorsed over to said person, and said person is holding defendant responsible to him, set forth no legal

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defense, and plea should have been stricken. 24 App. 186 (2) (100 S. E. 226).

Transferee: When suit is instituted by alleged transferee of negotiable prom-

issory note against maker, defendant can inquire into title of plaintiff when necessary to protect defendant or to let in defense which he seeks to make. 146/282, 283 (2) (91 S. E. 88).

§ 4291. (§ 3699.) **What is notice.**

Stated. 22 App. 667 (2) (97 S. E. 109). Cited. 145/551, 557 (89 S. E. 578).

Charge: There being no evidence to show that plaintiff took note with notice of fraud perpetrated on maker by agent of payee, or evidence to charge notice of such fraud, it was error to instruct jury on subject. 140/594 (5) (79 S. E. 459).

Consideration: Knowledge by bank that note was given for mining stock was not sufficient to put it on inquiry as to failure of consideration. 13 App. 23, 24 (78 S. E. 734).

Failure of consideration may be pleaded, where holder of notes sued on purchased same with notice that consideration would probably fail. 17 App. 680 (2) (87 S. E. 1099).

Constructive notice: Any circumstances which would have placed a prudent man on his guard constitutes sufficient notice to purchaser of note before maturity. 142/821 (1) (83 S. E. 961).

Recital in note that it was one of series of same tenor and of even date, said series representing balance of purchase money for tract of land, fully described in bond for title, which bond was made part of the note, "and all makers hereof and indorsers and securities hereon are hereby firmly bound by all the conditions and agreements of said bond," was enough to put purchaser of note upon such inquiry as would have led him to knowledge of fact that it had been fully paid and satisfied. 20 App. 814 (93 S. E. 513).

Where note sued on, as introduced in evidence, has required revenue stamp properly affixed and cancelled, and maker testifies merely that such stamping and cancellation were not done by himself at time note was executed, but does not show that such was not his own or authorized act prior to its transfer, or that at time of

assignment purchaser of note had knowledge of such original deficiency, the circumstances sworn to could not in any wise tend to put purchaser on notice of possible defense to obligation. 21 App. 42 (2) (93 S. E. 512).

In application of rule stated in this section question is not whether circumstances were such as might reasonably put indorsee upon notice that consideration could fail, but whether they were sufficient to put him on notice that it must fail or actually had failed. 22 App. 519 (1) (96 S. E. 452).

While in a particular case character and sufficiency of circumstances which should place prudent man on his guard are to be determined as questions of fact by the jury and not by judge as question of law, still, in application of this rule, question is not whether circumstances were such as might reasonably put indorsee upon notice that consideration could fail, but whether they were sufficient to put him on notice it must fail or actually had failed. *Id.*

Corporation: In action on negotiable promissory note payable to order of corporation, plea that note was given for certain stock, and that defendant was induced to buy stock by false statements as to solvency of corporation and value of stock, made by named person who was not alleged to be agent of corporation, was insufficient. 146/282 (1) (91 S. E. 88).

Evidence here was not sufficient to impute notice to plaintiff. 144/514, 516 (87 S. E. 675).

Guardian: Under this section and section 4286, one buying municipal or State bonds from guardian at private sale, without court order, after notice that bonds belong to estate, is liable to ward for such bonds, if their proceeds are misappropriated by guardian. 16 App. 559 (2) (85 S. E. 766).

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Question for jury: Evidence here authorized submitting whether note sued on was negotiated by indorsement and whether circumstance should have placed prudent man on his guard. 142/821 (2) (83 S. E. 961).

Under evidence here question whether indorsee was put on his guard so as to let in defenses of fraud and failure of consideration was for jury. *Id.*

It was question for jury here whether circumstances were sufficient to have put plaintiff on notice that

ment and whether circumstance there was failure of consideration before purchasing the note sued on. 20 App. 682 (2) (93 S. E. 301).

While character and sufficiency of circumstances which would place prudent man upon his guard, so as to constitute notice, in purchasing negotiable paper, are to be determined as questions of fact by the jury, still evidence introduced for that purpose must have some actual probative value. 21 App. 42 (2) (93 S. E. 512).

§ 4292. (§ 3700.) **Bills payable on demand, etc.**

After date: Promissory note payable "after date" and not otherwise expressing any time for payment is payable on demand, and a note payable "on demand after date" is not a note payable on time. 19 App. 52 (2) (90 S. E. 977).

Note payable "on demand next after date" is due immediately, and purchaser takes it subject to equities between original parties; use of word "next" could not have effect of extending time included by an expression construed to mean immediately. 19 App. 52 (2) (90 S. E. 977).

Note payable generally "after date," and not otherwise expressing any time for payment, is payable on

demand, and therefore due immediately, and bears interest from date. 19 App. 86 (2) (90 S. E. 978).

Purchaser of note payable on demand takes it subject to equities between original parties, though it is by its terms negotiable. 16 App. 425, 426 (2) (85 S. E. 634).

Note payable on demand is due immediately, and purchaser takes note subject to all equities between original parties. 19 App. 52 (1) (90 S. E. 977).

Ultra vires: Note payable on demand is subject in hands of one to whom it was transferred "without recourse" to defense of ultra vires. 16 App. 425, 426 (2) (85 S. E. 634).

§ 4293. **Notes or contracts for patent, copy, or proprietary rights.**

Construction: Sections 4294 (a) and 4294 (b), being substantial reproduction of this section and section 4294, are to be similarly construed. 143/51 (84 S. E. 131).

Defenses: Maker of note given for patent right may set up as defense all equities existing between original parties, or may make any defense available against original payee, but can not set up against bona fide purchaser before maturity any equities or defense against persons who may at any time have held the note as

bearer. 141/799, 800 (2) (82 S. E. 129).

Evidence here was insufficient to show notice to purchaser of note not stating on its face that it was given for corporate stock. 143/48 (2) (84 S. E. 129).

Innocent purchaser of negotiable note given for corporate stock takes same free from equities between original parties, where note does not on its face show consideration as required by this section. 143/48 (1) (84 S. E. 129).

§ 4294. **Purchaser takes note or contract subject to equities.**

Construction: Sections 4294 (a) and 4294 (b), being substantial reproduction of this section and section 4293,

are to be similarly construed. 143/51 (84 S. E. 131).

Maker of note given for patent right

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may set up as defense all equities existing between original parties, or may make any defense available against original payee, but can not set up against bona fide purchaser

before maturity any equities or defense against persons who may at any time have held note as bearer. 141/799, 800 (2) (82 S. E. 129).

§ 4294 (a). Notes or contracts for corporate stock sold by promoters.

Cited. 13 App. 23 (78 S. E. 734).

Construction: Acts 1912, p. 153, being substantial reproduction of sections 4293, 4294, is to be similarly construed. 143/51 (84 S. E. 131).

Waiver: Legal consequences of this act can not be waived. 15 App. 600 (2) (84 S. E. 89).

§ 4294 (b). Purchaser takes note or contract subject to equities.

Applied. 15 App. 600 (1) (84 S. E. 89).

Actual notice: Where purchaser of note has actual notice that it was given for purchase of stock in incorporated company, sold by an agent, traveling salesman, or promoter, such notice is just as effective to put him on notice that he is taking it subject to equities existing between original parties thereto as if consideration of note had been expressed in its face. 23 App. 270 (1) (98 S. E. 102).

Construction: Acts 1912, p. 153, being substantial reproduction of sections 4293, 4294, is to be similarly construed. 143/51 (84 S. E. 131).

Defenses: Where shares in real estate corporation were purchased from agent selling stock for corporation, and purchaser gave notes, each stating that it was given in part payment of capital stock, and that it was given with full knowledge of affairs of such corporation, and maker waived any defense as provided by this section, and agreed that transferee should hold it as bona fide purchaser, and free from condition other than stated therein, terms of notes did not preclude maker from pleading failure of consideration and setting up that he was induced to give them by misrepresentations of agent. 18 App. 597 (90 S. E. 176).

CHAPTER 7.

Of Defenses to Contracts.

ARTICLE 1.

Denial of the Contract.

§ 4295. (§ 3701.) Non est factum.

Cited. 14 App. 645, 646 (82 S. E. 51).

Corporation: Where note for stock in another corporation was signed and given in name of corporation by its manager, and plea of non est factum was filed, and it was not shown either that there was course of dealing from which authority to sign note could be implied, or that seal of corporation was affixed to note, or that act was

ratified, or that express authority to sign note was given to manager, but on contrary he testified that transaction was not discussed by the corporation's directors, note was properly rejected as evidence, upon objection that execution thereof was not proved and that authority of manager to sign was not shown. 23 App. 472 (1) (98 S. E. 407).

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Evidence: Plea may be established by circumstantial as well as direct evidence. 140/17 (78 S. E. 414).

Evidence that value of medical services rendered by payee of note alleged to have been given in payment, was grossly disproportionate to amount of note was admissible to show that debtor did not authorize or acknowledge execution of the note. *Id.*

Admission in evidence of notes sued on was not error, though their

execution was not proved by attesting witness, where defendants filed no plea of non est factum. 16 App. 14, 15 (7) (84 S. E. 483).

Promissory note which is basis of suit need not have execution proved, where no plea of non est factum has been filed. 16 App. 95, 96 (3) (84 S. E. 591).

Where instrument is sued on, its execution need not be proved, unless denied by plea of non est factum. 17 App. 648 (4) (87 S. E. 1090).

§ 4296. (§ 3702.) **Effect of alteration.**

Stated. 144/416, 417 (4) (87 S. E. 466).

Burden on defendant setting up that certain words relating to mortgage have been interpolated in note sued on to establish the same. 140/187 (2) (78 S. E. 767).

Charge: Where the court fully charged defendant's contention that contract was filled in after she had signed, failure to charge law as to alteration of written instrument was not error. 145/402, 403 (2) (89 S. E. 334).

Intentional: Alteration in promissory note must be made with intent to defraud, before it will void entire contract. 19 App. 319 (2) (91 S. E. 436).

Valid and completed contract can only be enforced against maker in

form in which it was executed, and if such completed instrument be intentionally, fraudulently, and materially altered by person claiming benefit under it, alteration voids the whole contract, at option of other party. 21 App. 624 (2) (94 S. E. 853).

Name: Affixing name of attesting witness to chattel mortgage after delivery and without mortgagor's consent not such material alteration as will invalidate mortgage. 13 App. 1 (1) (78 S. E. 770).

Note: Alteration in figures written on corner of note did not invalidate it where amount of note was written fully on its face. 13 App. 448 (79 S. E. 236).

§ 4297. (§ 3703.) **Alteration, by whom tried.**

Direct verdict: Where evidence in action on note in no way sustained plea of defendant as to ownership of note, or plea of usury, and court correctly determined that alteration alleged was not material, direction of verdict in favor of plaintiff was proper. 19 App. 319 (3) (91 S. E. 436).

Materiality of alleged alteration of promissory note is question of law for court. 19 App. 319 (1) (91 S. E. 436).

Where maker of note, who pleaded material alterations such as would work his discharge, while not profes-

sing to have clear recollection as to what was form of note when signed eight years previously, swore that he did not think that alleged material addition was embraced in note at that time, which evidence was corroborated by his testimony that alteration was contrary to understanding then had, and also by evidence of other parties relative to physical appearance of instrument, verdict in his favor, approved by trial judge, will not be disturbed. 23 App. 640 (99 S. E. 140).

§ 4299. (§ 3705.) **Indorsement, etc., not to be proved.**

Demurrer: Defendant's verified denial of transfer, assignment, or indorsement of drafts from original payee to plaintiff, and of "genuineness and

legality of any indorsement or transfer of said drafts," was sufficient compliance with this section to put plaintiff on proof of indorsement or

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assignments on which he sought relief, where no demurrer was filed by plaintiff. 14 App. 645 (82 S. E. 51).

Denial: Where indorsement of note is denied on oath, there must be proof of genuineness of such indorsement. 19 App. 516 (91 S. E. 939).

Evidence: Where one defendant was sued as maker and other as indorser of note, and they admitted prima facie case, assumed burden of proof and introduced evidence, this showed that note was so made and indorsed to plaintiff by the other defendant. 143/623 (1) (85 S. E. 858).

Admission in evidence of note sued on was not error, though their execution was not proved by attesting witness, where defendants filed no plea of non est factum. 16 App. 14, 15 (7) (84 S. E. 483).

Where holder's title is questioned by verified plea denying genuineness of indorsement, proof is necessary on part of plaintiff before note is admissible in evidence. 17 App. 170, 171 (3) (86 S. E. 434).

Non est factum: Indorsee of negotiable note not required to prove execution of indorsement in absence of plea of non est factum as to the indorsement. 13 App. 35 (1) (78 S. E. 772).

Pleading: Answer in suit by transferee of negotiable promissory note against maker and indorser that defendant denies second paragraph of plaintiff's petition, which paragraph alleged that defendants were indebted to petitioner as owner and holder, before maturity, of described note, executed by said

maker, and indorsed by payee, "said note being now held and owned by your petitioner," was in substance a denial of the genuineness of the alleged transfer. 146/282, 283 (3) (91 S. E. 88).

Where plea in suit by alleged transferee of negotiable promissory note against maker was sufficient to raise issue as to genuineness of transfer, available to defendant to protect himself against consequences of payment upon spurious transfer, it was erroneous to dismiss plea in its entirety. 146/282, 283 (6) (91 S. E. 88).

Where plaintiff's title to note sued on depended on what purported to be indorsement of bank by cashier, defense sufficient to withstand oral demurrer and to put upon plaintiff burden of proving indorsement was made by duly verified plea, "Defendant denies title of plaintiff to said note, and denies both the genuineness and legality of the indorsement of [named bank] on back thereof, and denies that said indorsement was authorized by said bank, and denies that title to said note has ever passed out of said bank." 19 App. 516 (91 S. E. 939).

Where note sued upon by transferee and holder itself shows that it was transferred to plaintiff for value and before maturity, indorsements and transfers are presumed to be genuine and dates thereof correct; plea which fails to deny unequivocally genuineness of indorsements and transfers, or dates thereof, is insufficient as plea of non est factum. 20 App. 489 (1) (93 S. E. 110).

ARTICLE 2.

Denial of the Obligation of a Contract, Either Originally or by a Subsequent Act of the Opposite Party.

§ 4302. (§ 3708.) Failure to perform concurrent conditions.

Cited. 148/267, 269 (96 S. E. 428).

Anticipatory breach: Absolute refusal by one party to perform executory contract containing mutual obligations, prior to date fixed for performance, if such repudiation goes to whole

contract, amounts to tender of breach of contract, and if accepted as such by opposite party, it constitutes anticipatory breach, and injured party may at his election at once sue and recover his entire damages; opposite

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party not required to accept tender of breach, but may elect to keep contract in force, in which case obligations of both parties will continue until time for performance. 20 App. 660 (1) (93 S. E. 532).

Where tender of anticipatory breach of contract has been accepted and suit at once commenced, injured party may recover entire value of his contract, as if breach continued to date fixed for performance; generally his measure of damages, as under contract of sale and purchase, is difference between contract price and market price on date fixed for performance. 20 App. 660, 661 (2) (93 S. E. 532).

Though plaintiff sues at once for anticipatory breach of contract, and trial is had before expiration of contract, measure of damages is difference between contract price of subject matter of contract and market price at time and place of performance, and not at time of breach; this is true although subject matter is an article usually and generally, but not exclu-

sively, sold for future or forward delivery. 20 App. 660, 661 (4) (93 S. E. 532).

Where subject matter of contract has no current value, measure of damages for anticipatory breach is generally difference between contract price and cost of production at time for performance, whether trial of action is before or after time fixed for delivery, but cost of production is material only where article has no market or current value, and evidence concerning cost of production is entirely irrelevant where subject matter of contract is sold generally throughout the United States, continental Europe, and Japan. 20 App. 660 661 (5) (93 S. E. 532).

Indivisible contract: In an indivisible contract the entire fulfillment of the promise by either, in absence of agreement to contrary, or waiver, is condition precedent to fulfillment of any part of promise by the other. 19 App. 518 (2) (91 S. E. 913).

§ 4303. (§ 3709.) **Dependent covenants.**

Mutual promises: Promises mutual to extent that each affords sole consideration to other will not be construed as independent, but will, in absence of clear indications to contrary, be taken as dependent one upon the other, while, ordinarily, dependent covenants are such as mutually afford to the other the whole consideration, still stipulation and circumstances of contract may be such as to render covenants mutual and dependent even though one of them affords to the other only a part of its consideration; in such case question whether covenants

are mutually dependent is to be determined by reference to rational intent of parties as disclosed by instrument, read in light of surrounding circumstance and purposes for which contract is made. 22 App. 280 (1) (95 S. E. 1028).

Payment: Where, by agreement with payee in note, indorser was to be paid a consideration of a certain per cent. on all merchandise sold to the maker, mere fact that such per cent. was never paid did not invalidate contract and relieve indorser from liability. 23 App. 609 (99 S. E. 222).

§ 4304. (§ 3710.) **Rescission.**

Stated. 13 App. 790 (80 S. E. 15).

Consent: Fact that buyer of fertilizer material had sold its factory and discontinued its business, which fact was communicated to seller, raised no legal obligation on part of seller to consent to rescission of contract. 20 App. 660, 662 (8) (93 S. E. 532).

Consideration: Where after sale of personal property vendor agrees to take

it back and in pursuance of such agreement receives such property from vendee, agreement having been executed, vendor can not thereafter claim that it was invalid for want of consideration. 146/245 (3) (91 S. E. 32).

Plea of failure of consideration was supported by evidence, from which it appeared that consideration of note sued on was certain number of shares

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of stock, never delivered, and that contract between original parties to note was rescinded. 20 App. 570 (93 S. E. 221).

No necessity existed for outlining in plea in action on promissory note the reason why a valid consideration existed for a release from liability, where, from statement of facts it necessarily followed as a legal consequence. 21 App. 530 (6) (94 S. E. 850).

Land: A conveyance by the vendor to a third person of a portion of the land within the time fixed for conveyance to the purchaser is a repudiation of the contract. 141/418 (81 S. E. 203).

Petition: Allegations in petition in action by interstate carrier against surety on bond of consignee to recover amount of judgment paid to consignor of "order notify" shipment held not subject to ground of demurrer insisting that facts pleaded therein showed rescission of delivery made under contract between the parties. 21 App. 707 (1-b) (95 S. E. 16).

Plea of defendant here contained sufficient material averments as to rescission of contract sued on, and hence was not subject to oral motion to strike. 16 App. 39 (1) (84 S. E. 490).

Return property: Where contract of sale or return provided that filter and unused disks were to be returned for credit in good condition to seller within thirty-five days from date, if directions for use were followed and results obtained were not satisfactory, return should have been made within time expressly limited, and question of reasonable time did not enter. 22 App. 167 (1) (95 S. E. 736).

§ 4305. (§ 3711.) **Rescission for fraud.**

Stated. 148/267, 270 (96 S. E. 428).

Acceptance: Where party contracts for property of specific kind and character, and property of different kind and character is tendered, party may treat contract as at an end and have his action for recovery of such part of purchase price as he may have paid

Where contract of sale or return provided that goods sold should be returned for credit within certain time, if directions for use were followed and results obtained not satisfactory, mere notice by purchaser, given prior to expiration of time limit, that machine had proved unsatisfactory and that unless better results could be had it would be returned, can not be taken as compliance with contract. 22 App. 167 (2) (95 S. E. 736).

Where contract of sale or return provided that goods sold should be returned for credit within thirty-five days, if directions for use were followed and results obtained were not satisfactory, rights of parties became fixed upon expiration of time limit unless limitation imposed had been in some way extended. 22 App. 167, 168 (3) (95 S. E. 736).

Where there is a breach of contract other party may rescind, on notification and return of what he has received, or he may abide by contract and recover damages for breach, but he can not do both. 23 App. 236 (1) (98 S. E. 188).

Plea in affidavit of illegality in proceeding to foreclose chattel mortgage securing note that one of the mules delivered to vendee was returned to the vendors who accepted said mule, took possession of him, and that in a few days he died in their possession, and asserting that there was a total failure of consideration in so far as value of said mule was concerned was a good plea of rescission, and fact that pleader denominated it as plea of failure of consideration did not defeat the plea nor its effect. 23 App. 393 (98 S. E. 365).

at time of making of contract; in such case he is not required to accept the property and sue for a breach of the contract. 20 App. 255 (1) (92 S. E. 1011).

Building contract: Provision authorizing owner to terminate contract and take possession and complete

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work if contractor neglects or fails to comply with contract was valid. 142/703 (1) (83 S. E. 660).

Provision for liquidated damages for delay, or giving of bond for faithful performance, will not destroy owner's right to take possession and complete work. *Id.*

Diligence: Defrauded party must act promptly on discovery of the fraud. 142/22 (7) (82 S. E. 459).

Not error to charge that rescission is allowed if party defrauded moves with reasonable promptness after discovering the fraud. 13 App. 512 (4) 79 S. E. 381).

False representations: Where seller relies on buyer's false representations that he owns certain property, he may rescind and recover property though buyer was solvent. 144/550 (5) (87 S. E. 651).

Where one purchasing land has opportunity to examine it before buying, but instead of doing so, voluntarily relies upon statements of vendor concerning its character and value, contract will not be rescinded or set aside, or purchase price abated, because of falsity of statements, unless some fraud or artifice was practiced by vendor to prevent such examination; this is true although vendee may have acted upon misrepresentations of vendor or his agent. 19 App. 16 (1) (90 S. E. 742).

Horse swap: As general rule, dissatisfied party to horse swap can not rescind the trade, unless he shows that other party's warranties as to animal traded by him were untrue, and that party making them knew that they were untrue when made; that on account of such misrepresentation he was injured, and that he offered to rescind trade within reasonable time. 20 App. 93 (1) (92 S. E. 543).

Where, in mule swap between A and B, it was agreed between them, as part of contract, that A was to take B's mule, which B represented to be perfectly sound, and, if mule proved to be unsound, A should have right to bring it back to B and rescind the trade, and where in fact the mule proved to be unsound and A was damaged thereby, A is entitled to rescis-

sion of the trade, whether or not B knew that his representations as to soundness were untrue. 20 App. 93 (1-a) (92 S. E. 543).

Offer to rescind must be made within reasonable time. 20 App. 93 (1-b) (92 S. E. 543).

Under facts here, it can not be said as matter of law that defendant's offer to rescind, made five or six weeks after trade, and after he discovered what was matter with mule, was not within reasonable time. *Id.* 93, 94 (2).

Where court charged that defendant, before he could rescind trade, must have carried mule back to plaintiff and offered to rescind trade within reasonable time after he discovered that mule was diseased, it was not error to refuse to charge that in order to rescind contract of sale, defendant must promptly, on discovery of the fraud, offer to the rescind contract of sale. 20 App. 93, 94 (4) (92 S. E. 543).

Dissatisfied party to horse swap is not entitled to rescission of trade unless he shows actual fraud on part of other party, or unless right to rescind was expressly reserved at time of sale. 20 App. 95 (1) (92 S. E. 544).

Where, in action on promissory note given as "boot" in horse swap, defendant's answer and cross-petition did not set forth that plaintiff's representation, as to qualities and worth of horse which defendant received, were known to be untrue by plaintiff at time they were made, or that right of rescission was expressly reserved as part of the trade, defendant was not entitled to rescission. 20 App. 95 (2) (92 S. E. 544).

Party alleged to have been defrauded in horse swap by means of fraudulent representations can not maintain trover, although he promptly repudiated contract and offered to return animal and note, which had been given as "boot," and demanded return of other animal, where, after offer to rescind had been refused, and after trover suit had been filed, he placed note in bank as collateral security for his indebtedness to the bank, and at maturity of note instructed bank cashier to collect it from defendant and to credit proceeds on

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his indebtedness to the bank, which was done. 20 App. 233 (1) (92 S. E. 954).

Under evidence that plaintiff traded a cow for horse, giving note for \$100, and about week later discovered certain defects, in the horse, and although he promptly carried horse back to defendant and complained of its defects, he did not demand rescission of the trade until about a month afterward, and until after the horse had been badly injured, which injury did not result from any of the defects complained of in the horse, plaintiff had no right to rescission of the trade. 20 App. 619 (93 S. E. 165).

Where trover was brought against three named persons to recover mare which plaintiff had swapped to a fourth person for a mule, court erred in refusing to rule out plaintiff's evidence to effect that such fourth person had represented the mule to be sound in every respect, no evidence having been introduced that connected defendants with such transaction, and such fourth person's representation not having been made in their presence. 21 App. 103 (1) (93 S. E. 1029).

Right to rescind for fraud in a horse-swap exists only where actual fraud has been committed, unless right to rescind has been expressly reserved. 21 App. 103 (2) (93 S. E. 1029).

Right to rescind horse-swap exists only by virtue of such special terms of contract of sale as may so authorize, or, in absence of any such agreement, by reason of knowingly false and fraudulent misrepresentation of existing facts, made to complaining party, whereby he was induced to act to his injury; mere breach of express warranty which was controlling inducement to trade, unaccompanied by any such fraudulent misrepresentation of fact, will not afford ground for avoidance of such a contract. 21 App. 809. (95 S. E. 314).

Right to rescind for fraud in horse swap exists only when actual fraud has been committed; rescission, where right to rescind is not expressly reserved, can not be had for constructive fraud or merely on account of

warranty, express or implied. 23 App. 690 (99 S. E. 230).

Purchaser of horse or mule is not entitled to rescission of trade unless he shows actual fraud on part of vendor, or special agreement between the parties, as part of the contract, that if animal proved to be unsound purchaser should have right to return it to vendor and rescind the trade. 24 App. 117 (1) (99 S. E. 894).

Injury: Person injured through misrepresentations as to incumbrances on property for which he exchanges his own may rescind. 142/432, 433 (3) (83 S. E. 103).

Land: Where purchaser is in possession under bond obligating vendor to make good title on payment of price, he can not rescind on ground that title is incumbered without proving fraud, that vendor is insolvent, or other facts authorizing equitable interference. 14 App. 644 (2) (82 S. E. 155).

Where mortgage executed by vendor is outstanding, actual sale of land under foreclosure would entitle purchaser to rescind. *Id.* 644 (3).

Maker of promissory notes given for purchase price of land of which maker holds undisturbed possession under bond from vendor, conditioned to make good and sufficient title under payment of notes, can neither voluntarily rescind contract of purchase nor defeat collection of notes, upon ground that vendor has not in fact good title, without showing clearly paramount outstanding title against vendor, and also proving fraud upon his part, or that he is insolvent, or non-resident, or else proving other facts which would authorize equitable interference with carrying out of contract. 146/524 (1) (91 S. E. 684).

Purchaser of land in undisturbed possession under absolute warranty deed can not have rescission and recover from grantor partial payments made on purchase price, or have damages covering costs of improvements on land, solely upon ground of defect in title; such relief depends upon grantee's equitable right of rescission or cancellation, which does not exist unless he allege that grantor is in-

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solvent or a non-resident, or allege fraud, mutual mistake, or some other fact making it inequitable for grantor to hold purchase money paid and to collect balance. 146/749 (2) (92 S. E. 213).

Pleading: Where allegations that land purchased was worth considerably less than plaintiffs agreed to pay, and that they would not have traded had they known they were not acquiring land which vendor's agent represented they would acquire, did not state grounds for rescission under this section. 144/441 (1) (87 S. E. 471).

Petition did not state cause of action in so far as it was based on theory that vendor's acts had rescinded contract, though it contained general allegations as to interference with plaintiff's representatives in control of land. *Id.* 441 (2).

Petition here by vendee against vendor for rescission held insufficient to charge fraud in execution of contract. 149/396, 397 (1) (100 S. E. 379).

Alleged plea of rescission which merely attempted to engraft contemporaneous parol agreement upon valid written contract, without showing any reason for its omission from the written agreement, was properly stricken, after trial court had afforded defendant opportunity to amend his answer and cure defects pointed out by plaintiff's demurrer. 18 App. 45 (3) (88 S. E. 825).

Amendment seeking to set up fraud in procurement of signature was properly disallowed, where facts necessary to constitute plea of fraud in procurement of instrument sued upon were not set out fully or with requisite particularity. 18 App. 126 (1) (88 S. E. 909).

Promptly: The word "promptly" does not mean "immediately," but means within a reasonable time. 20 App. 93, 94 (4) (92 S. E. 543).

Restoration: Where vendor seeks to recovered land from one to whom vendee has transferred bond for title, such assignee may require accounting for purchase-money paid by vendee. 142/22 (6) (82 S. E. 459).

Defrauded party must restore or offer to restore whatever of value he has received under contract. *Id.* 22 (7).

Where buyer rescinds for fraud and offers to return property, he need not, on seller's refusal to receive property, keep it until termination of controversy, but may either retain it as seller's agent, or, after notice, sell it for his account. 144/700, 701 (4) (87 S. E. 1054).

Where buyer, after attempting to rescind and refusal of offer to return property, abandons the property, his recovery in action for price paid will be reduced by its value. *Id.*

Restoration of goods bought need not be made if they are worthless. 13 App. 512 (4) (79 S. E. 381).

Where defense was that horse was not as represented, but there was no evidence that defendant had offered to return it, or that plaintiff had offered rescission, and plaintiff had only received defendant's check, on which payment had been stopped, error to permit defendant to testify that plaintiff had not offered to return money paid for horse. 14 App. 333 (4) (80 S. E. 864).

Before original buyer can avoid voidable sale made, pursuant to conditional bill of sale, by seller to himself on buyer's default, he must tender payment of debt secured. 14 App. 366 (80 S. E. 902).

Rule requiring restoration or offer to restore what aggrieved party has received is not applicable in action against attorneys to recover part of consideration paid for services in former action. 145/268, 269 (3) (88 S. E. 968).

Contract may be rescinded at instance of party defrauded, if injured party acts promptly on discovery of fraud, and restores or offers to restore to other whatever he has received by virtue of contract, if it be of any value. 146/687 (2) (92 S. E. 63).

Where suit is brought on insurance policy stipulating that policy will be void if procured by fraud on part of insured, defense that policy is avoided on account of willful and material

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misrepresentations, made by insured in his application, is not attempt to rescind contract, but attempt to have it declared void ab initio, and it is not necessary for insurer, before pleading, to return premiums paid or notes given therefor; this section is not applicable, but law governing action is found in sections 2479, 2480 and 2481. 19 App. 247 (2) (91 S. E. 344).

Though transfer of collateral security from one bank to plaintiff bank could be held illegal, former bank, or its receiver, could not demand return of its collateral from plaintiff bank without restoring latter to its original condition, which would mean repayment of debt, for security of which collaterals were transferred. 19 App. 434, 435 (3-a) (91 S. E. 509).

Settlement: Where petition does not make it appear that if fraud entered into making of contract of settlement of disputed claims over property between husband and wife the husband was not as fully aware of it at that time as any time subsequent thereto, or where petition fails to allege that plaintiff, promptly upon discovery of alleged fraud, restored or offered to restore whatever he received by virtue

of contract, husband was not entitled to rescind. 148/250, 251 (3) (96 S. E. 340).

Time: Cross-petition in action on purchase-money note was properly dismissed where it alleged that false representations on which defendants relied became known to him after execution of note, but did not show when he acquired such knowledge, or that he restored or offered to restore that which he had received, or claimed rescission of contract, except in the answer. 144/511 (1) (87 S. E. 653).

Trover: Where, in suit on open account for purchase price of personality, defendant entered only the defense that the goods purchased were worthless, finding for defendant precluded maintenance of subsequent action in trover for recovery of same property. 20 App. 267 (92 S. E. 1012).

Waiver: Where buyer of corporate stock delays several months after discovering that it will not pay dividends in an amount represented, and obtains an extension of his purchase-money note, and does not offer to rescind until suit is brought, he waives his right to rescind. 13 App. 772, 776 (80 S. E. 32).

§ 4306. (§ 3712.) Without consent.

Bankruptcy: Executory contract of employment of agent, which contains stipulation that part of his commissions on sales shall be applied in payment of pre-existing debt due to principal, does not remain in effect after agent's discharge in bankruptcy from such previous indebtedness, so that its continued compliance could be thereafter enforced; but so long as parties, by subsequent acquiescence in its terms and performance of its conditions, elect to treat the contract as still subsisting, they are bound by its provisions. 21 App. 87 (1) (94 S. E. 56, 40 A. B. Rep. 453).

Election: Where, after breach of contract, opposite party not only retains articles received but puts them to his own use, there is an election to abide by the terms of the original contract and such opposite party thereafter

holds under those terms the articles actually received. 23 App. 236 (1) (98 S. E. 188).

Executory contract may be broken, but it can not be rescinded, by act of one of the parties. 20 App. 660, 662 (6) (93 S. E. 532).

Non-payment for goods delivered under contract during series of years, in certain installments, justified refusal to fill order for more goods, which refusal did not justify return of goods by buyer, and claim of credit therefor. 140/107 (78 S. E. 763).

Non-performance: Breach of executory contract by one of the parties justifies its abandonment by the other. 13 App. 790 (80 S. E. 15).

Pleading: Petition here for rescission of contract for exchange of lands on grounds of defendant's breach of

Denial of obligation, originally or by subsequent act of opposite party.

agreement was subject to demurrer. 146/197, 198 (4) (91 S. E. 13).

Answer, in ejectment suit by vendor against vendee praying for accounting for amount paid by defendant on purchase price of land, set up substantial equity and was sufficient as basis for a decree. 148/418 (2) (96 S. E. 993).

Plea in action on note that defendant bargained certain property to S., receiving from him money and his notes, delivering to him bond for title, that she pledge such notes, that in accordance with subsequent agreement, under which S. was to surrender bond for title and house, she executed and delivered note upon which suit was based, that S. never surrendered such bond, that she had been unable to dispose of the property with the bond outstanding, that the consideration of the note sued on had totally failed and that plaintiff knew of such facts at time he received the note, was not subject to demurrer. 23 App. 663 (2) (99 S. E. 224).

Purchase money: If upon accounting prayed by defendant vendee in ejectment suit by vendor it should be determined that defendant had fully paid purchase money, she would be entitled to relief prayed; if it should be determined that she had not fully paid purchase price, she would be en-

titled, upon payment of balance due, to decree for portion of land to which plaintiff could execute title in conformity with his bond. 148/418 (2) (96 S. E. 993).

Sale: Failure or neglect of party to perform any provision of contract will, at option of others, release the other from all obligations. 140/107, 109 (78 S. E. 763).

Support: Where verdict and decree in equity cause establish contract for maintenance of defendant, consideration for deed, and that such maintenance was to be furnished at plaintiff's home, and that plaintiff had not, to date of verdict and decree, breached the contract, but that defendant had voluntarily and without legal reason removed from the home of plaintiff, if defendant refused, without legal justification, to return to such home and to accept support subsequently to date of verdict and decree, plaintiff (defendant in justice's court suit) has legal defense to that suit, and her remedy at law is adequate. 148/68 (95 S. E. 683).

Unreasonable complaints by owner of building as to details of the work not justify contractor in abandoning the work where owner does nothing to compel him to quit. 13 App. 790 (80 S. E. 15).

§ 4307. (§ 3713.) **Rights of purchasers after rescission.**

Cited. 144/587, 596 (87 S. E. 799).

§ 4308. (§ 3714.) **Covenant not to sue.**

Evidence: Defendants may introduce in evidence original writing as well as other competent evidence by way of attack on reformed and alleged corrected covenant not to sue, and it is question for jury whether plaintiff released as pleaded by defendant, or merely covenanted not to sue. 24 App. 86 (100 S. E. 46).

Persons affected: Covenant not to sue one jointly liable will not release any

one other than one with whom it is entered into. 24 App. 86 (100 S. E. 46).

Written: Agreement set up by plea that payee of note obligated himself not to bring suit thereon should have been in writing, in order to furnish valid defense as a covenant equivalent to release within meaning of this section. 20 App. 735 (3) (93 S. E. 234).

§ 4309. (§ 3715.) **Release.**

Joint debtor: Where payee of promissory note, of his own motion, releases one of the joint makers, the other is

discharged from liability. 18 App. 128 (1) (88 S. E. 899).

Where, in suit upon joint promis-

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sory note of husband and wife, only issues were those raised by pleas of recoupment and non est factum, and there was no plea of suretyship or that note was assumption by wife of husband's debt, dismissal of one of the joint makers operated to abate action as to the other, it being undisputed that joint obligation was signed by both makers or by neither. 18 App. 128, 129 (2) (88 S. E. 899).

Where there was no evidence that husband alone signed joint undertaking, but testimony for plaintiff showed that both husband and wife signed, and testimony for defendants showed

that neither of them signed or authorized anyone to do so, verdict against one of the defendants, after plaintiff had voluntarily dismissed action against other, was unauthorized. 18 App. 128, 129 (3) (88 S. E. 899).

Return of consideration: Where one agrees to pay the debt of another and receives a valuable consideration, he is not released merely because, on his failure to pay, the creditor, without a return of the consideration, agrees to look to the original debtor, instead of to the substituted debtor, for payment. 13 App. 102 (78 S. E. 831).

ARTICLE 3.

Of Payment, and Herein of Appropriation of Payments.

§ 4311. (§ 3717.) **Payment generally.**

Agent: If money paid agent ought in good conscience to be returned, action for money had and received may be maintained against either agent or principal or both, if agent failed to pay over money to principal. 13 App. 288 (4) (79 S. E. 16).

Where agent authorized to sell corporate stock only for cash, without authority employed another agent, who made the sale, collected the proceeds, deducted a portion for his services, and remitted balance to first agent, who paid none of it to the corporation, purchaser of stock, upon first agent's refusal to deliver, was entitled to recover from him the amount he received, but not the sum retained by the second agent. *Id.* 288 (5).

It was not error, on trial of action on promissory note for \$1,000, to exclude from evidence receipt to defendant for \$1,125 in payment of 50 shares of stock of plaintiff company, signed by certain person as "agent," where there was no evidence that note was given for shares of stock, and no evidence of signer's agency for company. 18 App. 385 (2) (89 S. E. 435).

Charge that payment to agent would bind principal, though agent failed

to pay over money, properly omitted in absence of request. 142/145, 146 (3) (82 S. E. 562).

Direction of verdict: In suit on promissory note, wherein defendant admitted prima facie case and pleaded payment, and where evidence wholly failed to show payment as pleaded, it was not error to direct verdict for plaintiff. 24 App. 108 (100 S. E. 37).

Evidence: Where defendant completed payment for fertilizer by check given to plaintiff's agent, and agent testified that only check given him by defendant was for cotton, two checks given to agent, one for cotton and other for fertilizer, were properly admitted. 15 App. 275 (82 S. E. 907).

Evidence disclosing that note sued on was transferred to secure debt, originally contracted by corporation and for which corporation received benefit, sufficiently showed that corporation would be estopped from demanding payment after payment had once been made to transferee. 16 App. 802 (86 S. E. 391).

While evidence of manner of payment, identifying specific checks claimed to have been turned over in settlement, would add probative value to proof relied on to establish

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plea of payment, the act of payment is the essential fact to be shown. 22 App. 144 (1) (95 S. E. 746).

Execution: Payment of an execution in hands of sheriff discharges defendant. 23 App. 656 (1) (99 S. E. 144).

Judgment: Where money recovered in legal action for particular person reaches him, nominal plaintiff can not demand that such money pass through his hands, and suit can not be maintained against beneficiary or his attorneys. 144/38 (1) (85 S. E. 1013).

Note: Maker of purchase-money note can bring action for breach of transferee's agreement to pay note, without first paying the same. 143/721 (1) (85 S. E. 895).

In action for breach of contract to pay note for which plaintiff is liable the unpaid note is admissible in evidence. *Id.* 721 (3).

It is no defense to action for breach of agreement to pay note for which plaintiff is liable that note was claimed by different parties. *Id.* 721 (4).

In absence of evidence showing that person to whom alleged payment was made was agent of holder of note, or that the holder had received the money, and the only defense being that of payment, not error to direct verdict for plaintiff. 13 App. 234 (2) (79 S. E. 35).

Plea, in action on note owed by an intestate, that plaintiff received from administratrix certain cotton which was raised on certain places, plaintiff knowing that cotton was rent cotton for year in which received, that cotton was received by plaintiff and should be credited on indebtedness due on note, one bale weighing certain amount, at certain amount per pound, and another bale weighing certain other amount, at same amount per pound, making total of certain sum, etc., did not show that cotton was delivered with direction that it be credited on note, or that it was received as credit; nor did plea set forth with definiteness required by law the defense of payment. 22 App. 94 (95 S. E. 308).

Answer filed in suit on promissory note for purchase price of mare, ad-

mitting execution of note but denying indebtedness, and alleging that plaintiff sold said note to a named third person, who afterward brought trover suit and recovered judgment for amount of note, which judgment had been paid off and settled in full, was properly stricken, it not alleging any defense. 24 App. 314 (100 S. E. 761).

Parent's debt: There is no law against a daughter's voluntarily paying her father's debt. 145/368 (1) (89 S. E. 330).

Plea: In order for defendant in suit on open account to prove payments, special plea must be filed, setting forth such payments. 18 App. 320 (1) (89 S. E. 351).

Plea of payment which fails to allege with reasonable certainty when, how, and to whom payment was made, and which fails to disclose any valid reason why such lack of certainty can not be met, is subject to be stricken upon special demurrer duly filed pointing out such defects. 22 App. 144 (1) (95 S. E. 746).

Where no special demurrer was duly filed to plea of payment setting up that plea failed to allege with reasonable certainty when, how, and to whom payment was made, verdict for defendant will not be set aside as contrary to evidence, where his testimony showed in distinct terms that the levied *f. fa.* was fully paid off, and such payment accepted by plaintiff. 22 App. 144 (1) (95 S. E. 746).

Receipt is written admission or acknowledgment of payment or delivery; it need not be in any particular form. 16 App. 377 (1) (85 S. E. 350).

Third person: Payment made to third person by request or with consent of creditor is good defense to action for debt. 22 App. 82 (1) (95 S. E. 310).

Contention of plaintiffs that defendant can not claim credit for money paid out by him for suppression of criminal prosecution is without merit, where there was direct and positive testimony that they directed him to pay the money into court to satisfy fine imposed against their brother and that such instruction was in fact obeyed. 22 App. 82 (2) (95 S. E. 310).

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§ 4314. (§ 3720.) **Bank-bills, checks, and notes, payment in.**

Stated. 22 App. 58, 65 (95 S. E. 381).

Check: Giving of bank check by payee of note to indorsee is not payment. 143/736 (1-a) (85 S. E. 881).

Check is not payment until paid, unless payee accepts it as such, and it does not operate as assignment of any part of drawer's deposit until accepted by drawee. 14 App. 1 (80 S. E. 18).

Court did not err in permitting witness for plaintiff to testify to payment made by check to defendant, without first introducing in evidence or accounting for check by which payment was made. While evidence of manner of payment, identifying specific checks claimed to have been thus turned over in payment would add probative value to proof relied on to establish such payment, act of payment is the essential fact. 24 App. 638, 639 (2) (102 S. E. 47).

Where claim is unliquidated because of bona fide dispute as to amount due, and debtor sends check to creditor for amount debtor claims to be due, but for less than that claimed by creditor, on express condition, written on check, that it is in full settlement of disputed claim, it is only where creditor has either agreed to accept, or after tender actually accepts such check as in full settlement, that retention thereof can be set up as accord and satisfaction. 24 App. 610 (2) (101 S. E. 697).

Where unpaid check for less than amount claimed, given by debtor to creditor, was produced by creditor upon trial or his action for price of goods sold, and was introduced in evidence, formal tender or surrender thereof to debtor is not necessary as condition precedent to final judgment in favor of plaintiff for full amount sued for, if otherwise entitled thereto. 24 App. 610, 611 (3) (101 S. E. 697).

Draft: Where bank sends to correspondent bank draft for collection, and drawee has on general deposit with collecting bank sum more than sufficient to pay draft, and instructs bank to pay same, which it agrees to do by charging draft to his account, and surrenders to drawee bill of lading at-

tached to draft, transaction constitutes payment as between drawer and drawee, although collecting bank was insolvent, insolvency being unknown to drawee, and, so far as appears, unknown to officials of bank at time. 18 App. 377 (89 S. E. 454).

Evidence: Admission by payee that he had checks ten days after he received them and used them to pay for land purchased from another is relevant on the issue of presentation within a reasonable time. 140/302 (1) (78 S. E. 1069).

Where it is relevant to show that if check had been promptly presented it would have been honored, it is competent for witness to testify that drawer gave him a check for about the same sum a few days later on the same bank, which was paid and credited to his account before presentation of the dishonored check; a witness's deposit book containing the entry is admissible. *Id.* 302, 303 (2).

Note: Upon proof that note sued upon evidenced a transaction independent of prior accounts between parties, presumption that execution and delivery of note evidenced a settlement of transactions may be rebutted; charge here held not erroneous. 13 App. 119 (3) (78 S. E. 862).

Where promissory note is given in settlement of open account, without express agreement that note shall extinguish pre-existing debt, it is condition precedent to final judgment upon account that note be surrendered to maker, or accounted for by showing that it is not in any event enforceable against him. 146/235 (1) (91 S. E. 82).

Court erred in not submitting to jury disputed issue of fact as to whether or not account or any portion thereof had been closed by promissory note. 146/235 (2) (91 S. E. 82).

While mortgage can have no existence apart from debt which it is given to secure, it is well settled that intention of parties is controlling as to whether or not, when one note is given in substitution for another, the substituted note is to operate in extin-

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guishment of the original debt; where it clearly appears, by express exception in written agreement, that satisfaction of original note was conditioned upon retention of mortgage as a valid lien, such a substitution would not operate in extinguishment of the mortgage. 21 App. 159 (93 S. E. 1018).

Promissory notes are not payment until themselves paid, in absence of express agreement to contrary. 21 App. 630 (2) (94 S. E. 841).

Third person: A vendor of land who received from his vendee the check of

a stranger, payable to and indorsed by a third person, to be collected and its proceeds applied to the payment of the purchase-money, is bound to exercise reasonable diligence in the presentation of the check. Although the drawer may be overdrawn in his account with the drawee, nevertheless, if the latter receives deposits from the drawer and pays his checks, it is the duty of a holder of a check of such drawer to present it, with reasonable diligence, to the drawee. 140/302, 303 (3) (78 S. E. 1069).

§ 4316. (§ 3722.) Appropriation of payments.

Cited. 143/479, 482 (85 S. E. 315).

Administrator must pay debts in accordance with priority established by law, and this section does not apply to payments made by such administrator. 14 App. 310 (1) (80 S. E. 700).

Agreement: Where creditor and debtor agree that payment shall be applied otherwise than as provided in written contract between them, application may be made as last agreed. 141/578, 579 (3) 81 S. E. 892).

Where debtor makes payment to creditor bank, and cashier gives him receipt, stating that payment will be credited on certain notes, and debtor and cashier agree upon application of payment different from statement in receipt, and application is so made, debtor could not complain. *Id.* 578, 579 (3-b).

Burden of proof: Proof that one who is indebted to two persons represented by same agent paid agent enough to discharge obligation on which suit was based places burden on defendant, claiming that payment was applied to different obligation, to show that debt to which payment was applied was due and was of amount sufficient to exhaust payment. 15 App. 69, 70 (3) (82 S. E. 588).

Charge: Where there was no evidence showing amount and validity of alleged demands against debtor to extinguishment of which admitted payment was alleged to have been appropriated, failure to charge that if only one demand was proven to exist

payment would be applied to it was error. 15 App. 69, 70 (6) (82 S. E. 588).

Consent: Where debtor directs that payment be credited on particular debt, it must be so credited, with or without creditor's consent. 17 App. 436 (2) (87 S. E. 603).

Direction by debtor to creditor's stenographer having authority to receive payment made was notice to creditor and required that payment be credited pursuant to such direction. 17 App. 436 (2) (87 S. E. 603).

Execution: Holding that dividend paid to plaintiff in *fi. fa.*, on several demands against bank, including execution against bank as principal and another as surety, should be applied ratably to all of such demands (and not exclusively upon the other and unsecured demands held by creditor, at creditor's sole option or selection), notwithstanding no election had been made by principal debtor, and although surety would not ordinarily be empowered to direct application of voluntary payment made to such creditor by his principal or another, was not error. 22 App. 138 (2) (95 S. E. 729).

Intention: Appropriation of general payment, whether directed by debtor or applied by creditor, or by law, is, in legal intentment, in accordance with debtor's intention. 15 App. 69, 70 (6) (82 S. E. 588).

Judicial proceedings: Where funds are distributed in judicial proceedings, the law will direct application in such manner as is reasonable and equitable,

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both as to parties and third persons. 22 App. 138 (1) (95 S. E. 729).

Landlord: Fact that creditor, debtor's landlord, held special lien on property delivered to him in payment of one claim did not authorize him to apply such payment on unsecured claims contrary to debtor's instructions. 17 App. 436 (1) (87 S. E. 603).

Lien: Where landlord received no direction from tenant to apply payment to rent, the tenant leaves it optional with the landlord to apply the payment either to the rent due or to any other unsecured indebtedness which the landlord holds against him. 13 App. 101 (78 S. E. 829).

Mortgage: Payments by mortgagor after foreclosure with directions that they be entered upon mortgage *fi. fa.*, should be entered accordingly. 141/727, 729 (3) (82 S. E. 451).

Where payments by mortgagor after foreclosure were entered upon mortgage *fi. fa.* pursuant to his directions, that he was indebted to plaintiffs in additional amount for attorney's fees did not authorize plaintiffs to thereafter have credits taken from *fi. fa.* and applied to payments of such unsecured attorney's fees. *Id.* 727, 729 (3).

Debtor making payment may direct that it be applied to mortgage rather than to open account. 13 App. 632 (5) (79 S. E. 755).

One demand: Where only one demand is proved to exist against debtor, and payment has been made without direction as to application, law will apply it to that demand. 15 App. 69, 70 (6) (82 S. E. 588).

Presumption: Intention of debtor that payment should be applied to debt not

proved to exist, or one not due, can not be presumed. 15 App. 69, 70 (6) (82 S. E. 588).

Surety: No defense in action against surety on note that principal was dead and his administrator had made payments which holder had appropriated to other indebtedness, where it did not appear that if direction had been followed, payment would have been upon debt properly entitled to be paid according to priority established by law. 14 App. 310 (1, 2) (80 S. E. 700).

Third person: Debtors who took no part in contract between creditor and one debtor, or in making an application of payment, can not complain of application made of payment. 141/578, 579 (3-a) (81 S. E. 892).

While rights of third persons must be respected by creditor in making application of payments to him by debtor, and while creditor holding both secured and unsecured claim can not appropriate payment first to unsecured claim, over objection of creditor holding lien upon property from which fund of payment was derived, still, where secured creditor receiving money paid it in debtor's behalf to third person holding claims against latter, and in good faith only acted as agent of debtor, principle of law stated above can not be made to apply. 20 App. 219 (92 S. E. 971).

Voluntary payments: Provision that when debtor makes payment to creditor holding several demands, and fails to direct how it shall apply, creditor may appropriate it to any of them, relates to voluntary payments only. 22 App. 138 (1) (95 S. E. 729).

§ 4317. (§ 3723.) Voluntary payments.

Construction: This section should be construed together with section 4116. 19 App. 256 (1) (91 S. E. 281).

County treasurer: In proceeding by county and others against former county treasurer, findings that his term expired December 31, 1916, under Laws 1915, p. 363, that county commissioners in their settlement were not authorized to allow him commissions on taxes in

hands of tax collector on January 1, 1917, and that they might collect back from him commissions on taxes illegally allowed him in their settlement, notwithstanding the settlement, and that a *fi. fa.*, proceed for collection of certain amount with 7% interest, were proper. 24 App. 271 (100 S. E. 721).

Freight charges: Where defendant was not responsible for act of railroad com-

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pany in transporting other and different property instead of plaintiff's property, and in paying or promising to pay the railroad company the freight charges, the plaintiff was a mere volunteer, and he can not recover from defendant the amount thus unnecessarily expended. 18 App. 37 (2) (88 S. E. 750)

Ignorance of law: Payment made with full knowledge of facts, though in ignorance of legal rights, can not be recovered back in absence of duress, fraud or deception. 14 App. 225 (3) 80 S. E. 523).

Where widow without administration undertakes to wind up estate of husband and pays one of his creditors out of her separate estate, she can not recover such payment, though ignorant of fact that she could not be compelled to pay husband's debts. *Id.* 225, 226 (4).

Mistake: Money paid through mistake of law, with full knowledge of all the facts, can not be recovered back, unless person to whom it was paid can not in good conscience retain it. Applied to insurance company paying insurance with knowledge of fraudulent procuring of transfer of policy. 140/148 (3) (78 S. E. 938).

Where money due bank was by mistake paid to another, and company receiving could not in equity retain it, and it lost nothing by payment, parties paying money were entitled to recover it. 13 App. 453 (1) (79 S. E. 363).

Where defendant set up claim for money which, though due to bank on the debt of an insolvent company, was paid to plaintiff company through mistake, evidence explanatory of transactions between defendants and the insolvent company was admissible to show how the mistake was made. *Id.* 453 (2).

Where land is sold at certain price per acre and plaintiff pays excess over such price through mistake made by

surveyor, who was selected by both parties to ascertain the exact acreage, plaintiff is entitled to recover such excess. 13 App. 483 (79 S. E. 372).

Money paid under mistake of fact, or in ignorance of facts, may be recovered, where party receiving it ought not in equity to retain it. 16 App. 475 (2) (85 S. E. 791).

Payment: Where executor fraudulently incumbers land conveyed by testator to another by unrecorded deed, and incumbrancer is innocent of fraud, payment of incumbrance by grantees will not relieve executor from liability for damages from his fraud. 144/519, 520 (5) (87 S. E. 661).

Settlement of dispute: Where one transferred bond for title to secure payment of money represented by note, it was not competent for him, on trial of suit brought by transferee to enforce demand for debt, to show that at time of making transfer there was between him and transferee a certain dispute, and that transfer was made in settlement thereof, but that at time of transfer the transferor had in fact paid account which was in dispute, and that receipts had been given, and that he actually claimed that he had paid the debt, and gave new note to keep from being sued. 148/344 (96 S. E. 858).

Tax: Application by one who had advanced money to pay taxes on railroad properties for order authorizing receiver to pay such taxes was properly refused, priorities of liens having been fixed by order of court which confirmed sale of such properties and it not being sought to have the order reopened. 149/146 (99 S. E. 859).

Unfounded demand: Payment made on unfounded demand can be recovered back when made under urgent and immediate necessity or to release property from detention. 19 App. 256 (1) (91 S. E. 281).

Of performance, and herein of tender.

ARTICLE 4.

Of Performance, and Herein of Tender.

§ 4318. (§ 3724.) Performance of contracts.

Architect: On acceptance of work by owners after architect had rendered entire services for which he contracted, architect was authorized to sue for balance due him notwithstanding defects. 144/145, 146 (1) (86 S. E. 316).

Architect's undertaking implies that he possesses skill and ability, including ordinary good taste, and will exercise same reasonably and without neglect. *Id.* 145, 146 (2).

Description: Purchaser, on payment of purchase-price, is not entitled to deed describing the land differently from description in contract of sale, or with recitals and admissions of fact not therein contained. 142/344 (4) (82 S. E. 1059).

Personal performance: When rights under contract are coupled with obligations to be performed by the contractor and involve a relation of personal confidence, contract can not be assigned without consent of other contracting party. 140/435, 446 (79 S. E. 196).

Recoupment: On plea of recoupment in architect's action for balance due him, burden of proof was on defendant owners. 144/145, 146 (1) (86 S. E. 316).

Any damages resulting from negligent performance of contract by architect was matter of recoupment in architect's action for balance due him. *Id.*

Rescission: Where time is not of the essence of contract for sale of land

non-payment of purchase-price at time stipulated will not authorize rescission or forfeiture. 142/344 (3) (82 S. E. 1059).

Where vendor entitled to rescission notifies vendee of intention to rescind if price is not paid within certain time such time must be reasonable. *Id.*

Sale: Words "subject to approval of titles" here meant that purchasers would inquire into seller's title and if they approved the same would carry out contract of sale. 143/205 (2) (84 S. E. 451).

Servant: Performance of employment contract must be a substantial compliance. 142/351 (2) (82 S. E. 1053).

Time: Sale subject to approval of titles was inchoate, but would become binding on seller if purchaser would within reasonable time approve the title. 143/205 (2) (84 S. E. 451).

Time intervening between date of contract and date of alleged tender of price was not as matter of law unreasonable time for approval of title. *Id.*

Work: Under contract to construct framework for court house, county, on contractor's default, having completed the work, contractor was not entitled to further payments until work was finished, and then only if balance due exceeded expense incurred by county. 144/691, 693 (2) (87 S. E. 1022).

§ 4319. § 3725.) Impossibility of performance.

Cited. 17 App. 550, 553, 554 (87 S. E. 831).

§ 4321. (§ 3727.) Fault of other party.

Cited. 142/351 (2) (82 S. E. 1053); 17 App. 550, 553 (87 S. E. 831).

§ 4322. (§ 3728.) Tender.

Allegation of offer to pay is not the equivalent of a tender. 140/719, 720

(3-b) (79 S. E. 775), 759 (79 S. E. 771).

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Attorney: Offer by plaintiff's counsel during trial to pay amount received by plaintiff for release, which he had signed, to defendant's local counsel, who had nothing to do with settlement of damage claims prior to suit and no authority to accept tender, was not sufficient tender to cure failure to make proper tender before suit. 141/743 (3) (82 S. E. 139).

Conditional tender: In order that tender of property received by infant shall operate as equivalent of its actual return, and so prevent ratification of voidable contract tender must be unconditional. 22 App. 192 (95 S. E. 734).

Tender fails to be absolute even though only condition accompanying it is such as to impose performance of duty actually owing by one to whom purported tender is made. 22 App. 192 (95 S. E. 734).

Interest: Tender of amount, without interest which party had agreed to pay, was not sufficient tender of amount due to operate as legal tender. 145/835 (90 S. E. 56).

Tender to prevent running of interest must be continuing; using money after refusal by creditor to receive it destroys this necessary attribute of a legal tender. 23 App. 607, 608 (2) (99 S. E. 147).

Land: Purchaser suing to recover damages for alleged breach of contract by vendor by refusing to make conveyance, general rule is that tender of cash must be made, unless it is waived. 140/719 (2) (79 S. E. 775).

Proposition for owner to bring or send to a city in another state a conveyance to a purchaser from plaintiff, and receive payment, or that such proposed purchaser would send check to bank to be delivered upon the delivery of conveyance, did not amount to a tender. *Id.* 719, 720 (3-b).

Party: Tender may be made by an agent or friend at instance of interested party. 19 App. 296, 298 (6-e) (91 S. E. 428). See 22 App. 48 (95 S. E. 379).

Plea: Allegation of tender by plaintiff to defendant of "either of the said

mentioned amounts" was indefinite as to whether plaintiff tendered each of two amounts previously mentioned or made alternative tender. 141/825 (3) (82 S. E. 132).

Purchase money: Tender of purchase-money on repudiation of sale will be excused where transaction is involved and mutual accounts have sprung out of it, on principal's offering to account for what moneys he may be equitably due as a condition to rescission. 140/101, 106 (78 S. E. 717).

Refusal: Formal tender is unnecessary where express declarations are made by party to whom money is payable that he will not accept it if tendered. 19 App. 296, 298 (6-e) (91 S. E. 428). See 22 App. 48 (95 S. E. 379).

Where one of the defendants testified that on day on which note sued on became due he tendered to plaintiff certain amount in cash, which plaintiff refused to accept, and that he then turned the money over to his bookkeeper, who might have put the money in the bank, that he put his money in the bank and handled his business through the bank, and that he had overdrawn several times since date on which he tendered money to plaintiff, court erred in directing verdict in favor of defendant's plea of tender. 23 App. 607, 608 (2-a) (99 S. E. 147).

While defendant further testified that he had with him in court the amount which he claimed to have tendered which he had that morning procured from the bank, and that, had plaintiff decided to accept such amount, he was at all times ready, willing and able to pay it, whether he had the money in the bank or not, because he had made arrangements whereby he could get it, such testimony was not sufficient to show that tender was continuing. 23 App. 607, 608 (2-b) (99 S. E. 147).

Security deed: Where, in action against grantee in deed given as security, and against his grantee, to cancel both deeds, it appears that first grantee has absented himself, so that tender of debt could not be made to him, action may be maintained, providing plaintiff offers to pay money

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into court for him. 141/642 (4) (81 S. E. 881).

Specific performance: Tender of cash must be made by proposed purchaser, unless it is waived. 140/719 (2) (79 S. E. 775).

Waiver: Formal tender of payment of note was in effect waived by statement on part of plaintiff, when defendant offered to pay note, that amount due thereon would not be accepted unless amount due on former note was also paid, and plaintiff could not recover interest from that time on first-mentioned note. 23 App. 356 (3) (98 S. E. 418).

Tender required by contract may be waived by conduct amounting to repudiation of contract, or by obstructing or preventing the tender. 24 App. 217 (2) (100 S. E. 644).

General demurrer was properly overruled here to petition in action for breach of option contract for sale of land to petitioner on stated terms as to payment, assumption of loan, insurance, etc., alleging petitioner's repeated efforts to tender amount required within option period and defendant's repeated refusals to see him, and her refusal to carry out contract, and asking damages. 24 App. 217 (3) (100 S. E. 644).

ARTICLE 5.

Accord and Satisfaction.

§ 4326. (§ 3732.) **What is accord and satisfaction.**

Accepting and retaining money: Acceptance and collection of check containing statement that it is to be applied in full settlement of all accounts due by the debtor operates as a full settlement and satisfaction of all accounts owing previous to that date. 13 App. 471 (1) (79 S. E. 375).

Where one claims a debt against another, correctness of which is disputed, and debtor sends check or other medium of payment to creditor, with statement that payment is in full settlement of claim, creditor can not accept and use such payment and afterwards maintain suit for balance. 23 App. 52, 55 (97 S. E. 455).

Bankruptcy: Under facts here creditor was entitled to payment by bankrupt's debtor as against trustee. 224 Fed. 269.

Benefit to creditor: An accord and satisfaction must be advantageous to the creditor, and he must receive an actual benefit therefrom which he would not otherwise have had; restoring to plaintiff his chattels or his land, of which defendant has wrongfully dispossessed him, will not be any consideration to support promise by plaintiff not to sue him for those injuries. 23 App. 52, 55 (97 S. E. 455).

Charge: Where plea of accord and satisfaction is unsupported by evidence error to charge that defendant could not prevail unless he showed that note sued on had been paid and to omit to charge on acceptance and collection of note as constituting full settlement. 13 App. 471 (2) (79 S. E. 375).

Check: Acceptance of check reading "in full" and retention of money was accord and satisfaction, though creditor erased words quoted. 16 App. 83 (1) (84 S. E. 834).

Consideration: Settlement purporting to release defendant from individual liability was unenforceable, where based on accord and satisfaction devoid of consideration. 14 App. 660 (2) (82 S. E. 152).

An accord and satisfaction is a contract, and consequently must be based on a valid consideration. 23 App. 52, 54 (97 S. E. 455).

If one having several different demands against another accepts payment of one or more and gives receipt, there being at time no mention of other demands, mere recital in receipt that it is in full payment of all claims is without consideration so far as relates to unsettled note signed by party

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making payment and another not mentioned or in minds of parties at time, and signing of receipt does not estop holder of unsettled demand from asserting such demand, nor does signing of receipt render it incumbent upon holder to refund money received from settlement as to disputed claims. 24 App. 277 (1) (100 S. E. 719).

Definition: An accord and satisfaction is an agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions on this account. 23 App. 52, 55 (97 S. E. 455).

Election: Where agreement has been reached between parties as to amount of indebtedness due by one to the other after comparison and adjustment of their respective claims, and a portion only of resulting sum of indebtedness agreed upon is paid by one party and balance thereof still remains unpaid, other party is not compelled to rescind or disregard the compromise agreement and sue on the original claim, but may at his election retain the amount received under the compromise agreement and maintain an action for the balance due thereunder. 22 App. 653 (1) (97 S. E. 90).

Evidence: Writing adjusting claim for salary admissible though not signed by plaintiff and though he testified that he never accepted the agreement contained therein, nor acted on it, when the evidence tended to show that he had accepted and acted on it. 140/15 (78 S. E. 408).

Where one transferred bond for title to secure payment of money represented by note, it was not competent for him, on trial of suit brought by transferee to enforce demand for debt, to show that at time of making transfer there was between him and transferee a certain dispute, and that transfer was made in settlement thereof, but that at time of transfer the transferor had in fact paid account which was in dispute, and that receipts had been given, and that he actually claimed that he had paid the debt, and gave new note to keep from being sued. 148/344 (96 S. E. 858).

Execution: Where accord and satisfaction is pleaded in bar to suit based on original cause of action, it must appear that accord has been fully executed. 22 App. 653 (1) (97 S. E. 90).

Jury: Whether there was bona fide dispute as to amount of claim was question of fact for jury. 16 App. 83 (3) (84 S. E. 834).

Note: Where note sued on was given pursuant to accord and satisfaction of prior contract, but note given to evidence previous liability was never delivered as agreed, there was no executed accord. 15 App. 684, 685 (2) (84 S. E. 153).

Where person holding note takes new note for same amount, with collateral notes and mortgage, and thereafter records mortgage and collects collateral notes, there is presumably complete satisfaction of original note. 15 App. 772 (2) (84 S. E. 157).

Unconditional acceptance of note as payment of pre-existing account, some items of which are in dispute, is accord and satisfaction of the account, which precludes maintenance of action upon it. 18 App. 125 (88 S. E. 913).

Where evidence authorized finding that acceptance of note given in payment of pre-existing account was expressly dependent upon condition that certain bank would discount such note, and that this condition was not met, effort to settle account by the note was shown to be nugatory, and plaintiff was entitled to sue upon the account, even if he had not attempted to return the note. 18 App. 125 (88 S. E. 913).

Where plaintiff's pending suit against defendant was settled between parties and marked settled on defendant's payment of money and delivery of stock, in full settlement of claims, it did not operate as settlement of note signed by defendant and another, not mentioned at settlement. 24 App. 277 (2) (100 S. E. 719).

Petition here in proceeding against attorney to require him to pay over money collected on petitioner's claim, which showed that petitioner had used defendant's check without acceding to demand for a larger fee, was not de-

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murrable as showing on its face complete accord and satisfaction. 23 App. 52 (97 S. E. 455).

Plea: Allegations of defendant's answer on subject of accord and satisfaction are to be construed, upon demurrer, in connection with recitals of certain exhibits attached to and made part of the answer. 146/525 (1) (91 S. E. 780).

Sale of goods: Where debtor sends cotton to creditor to sell, providing he honor debtor's draft for a certain sum and apply balance on the debt, and creditor agrees thereto but

declines to honor the draft, and thereupon the debtor instructs him that a sale of the cotton without honoring such draft must be treated as a settlement of the debt, a sale without payment of such draft constitutes a complete accord and satisfaction. 13 App. 410 (1) (79 S. E. 219).

Unliquidated claim: Claim is unliquidated where there is bona fide contention that debtor is not liable for full amount. 16 App. 83 (2) (84 S. E. 854).

§ 4329. (§ 3735.) **Less than debt is not satisfaction.**

Check for less than amount claimed by creditor is not payment of debt until it is itself paid, or unless expressly so agreed. 24 App. 520 (1, 2) (101 S. E. 199).

Where claim is unliquidated because of bona fide dispute as to amount due, and debtor sends check to creditor for amount debtor claims to be due, but for less than that claimed by creditor, on express condition, written on check, that it is in full settlement of disputed claim, it is only where creditor has either agreed to accept, or after tender actually accepts such check as in full settlement, that retention thereof can be set up as accord and satisfaction. 24 App. 610 (2) (101 S. E. 697).

Where unpaid check for less than amount claimed, given by debtor to creditor, was produced by creditor upon trial of his action for price of goods sold, and was introduced in evidence, formal tender or surrender thereof to debtor is not necessary as condition precedent to final judgment in favor of plaintiff for full amount sued for, if otherwise entitled thereto. 24 App. 610, 611 (3) (101 S. E. 697).

Payment of money: Acceptance of sum tendered in full satisfaction of debt in dispute is acceptance of condition, and discharges debt, though sum is less than such debt. 14 App. 191 (1) (80 S. E. 679).

§ 4330. (§ 3736.) **Compromise.**

Costs: Where action for damages was settled by payment of agreed sum, and defendant agreed to pay costs, this included all costs in the case, not merely such as might have been taxed if case had proceeded to trial and resulted in verdict for plaintiff. 145/189 (88 S. E. 940).

Family compromises: Law favors compromises, when made in good faith, especially when relating to family controversies, and a promise in extinguishment of a doubtful claim furnishes sufficient consideration to support a valid contract. 19 App. 269 (1) (91 S. E. 346).

Contention of plaintiff that his deceased wife was indebted to him for services rendered does not sup-

port promise on part of his son to pay stated sum of money in order to prevent action against decedent's estate, it appearing, from plaintiff's own testimony, that deceased wife had only a life estate in certain realty, and owned no other property whatever. 19 App. 269 (2) (91 S. E. 346).

Joint defendants: On petition to reform release executed to one defendant, after it had been voluntarily reformed by one defendant in accordance with original intent of parties, it was error to enjoin defendants from using it as a defense. 147/349 (94 S. E. 218).

Where less than amount of execution is received from one of the joint defendants therein, under agreement

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made or authorized by plaintiff that payment thus received shall relieve that defendant from further liability, agreement will discharge other defendants; but such an agreement by a sheriff, made without authority from plaintiff, will not have that effect. 23 App. 297 (1) (97 S. E. 891).

Jury: Conflict as to exact terms of compromise agreement was for determination of jury. 19 App. 351 (1) (91 S. E. 490).

Mistake: One injured in railway collision who executes voluntarily and upon consideration adequate for injuries then known written release of all claim on account of his injuries can not, on subsequent discovery of injuries not known or suspected at time of settlement, obtain cancella-

tion of release, on ground of mistake, in absence of fraud or undue influence, and recover for such injuries, although compensation received is wholly inadequate in view of injuries. 23 App. 554 (99 S. E. 133).

Note: Where illiterate person, who is able to contract, enters into accounting with another, and voluntarily signs promissory note in settlement, true purport and terms of which he fully understands, he is ordinarily bound thereby and will not, in absence of fraud or mistake, be heard to set up as defense mere fact that under accounting wherein it was given in settlement he failed to receive certain credits to which entitled and that certain elements of indebtedness included therein were unjust. 22 App. 83 (1) (95 S. E. 317).

ARTICLE 6.

Of Pendency of Another Action, and Former Recovery.

§ 4331. (§ 3737.) Plaintiff required to elect between suits.

Cited. 15 App. 561, 562 (83 S. E. 969); 17 App. 58, 59 (3) (86 S. E. 278).

Amendment: Where petition is duplicitous in its description of land, but is amendable by striking out certain portions thereof, and, as amended, is sufficient to authorize proceeding for recovery of portions definitely described, it is sufficient to sustain plea in abatement of another action pending in ejectment for the same land. 141/639, 640 (1) (81 S. E. 1035).

Amendment to defendant's plea, in suit for damages through delay in transportation of shipment, seeking to abate suit because of pendency of another suit on same cause of action, not dilatory. 17 App. 78, 79 (3) (86 S. E. 95).

Another State: Where statute of Alabama was pleaded as basis for recovery for personal injuries received in that State, in action by injured person and also in subsequent action by administrator of plaintiff, effect of one action on the other deter-

mined according to Alabama law. 140/368, 369 (1-a) (78 S. E. 919).

Attachment not levied is not such pending suit as may be pleaded in abatement of subsequent action in personam. 143/192 (1) (84 S. E. 442).

Condemnation proceedings: Where owner sues to enjoin condemnation proceeding and obtains interlocutory injunction, and, pending writ of error, another corporation is organized to carry on same corporate business and institute separate proceedings to condemn the same land, pendency of former suit and grant of temporary injunction will not furnish ground for enjoining condemnation proceedings instituted by second corporation. 147/22 (1) (92 S. E. 539).

Corporation: Where corporation surrenders its charter, pending suit in which it is plaintiff dies and can not be pleaded in abatement to subsequent suit. 16 App. 521 (2) (85 S. E. 685).

Damages: Where petition in action by cropper against his landlord for

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wrongful refusal to perform contract contains averments on which to base inconsistent measures of damages, plaintiff must, at the trial, elect upon which he will rely for recovery. 22 App. 284 (2) (96 S. E. 16).

Defense: Plea in abatement, filed by defendant and allowed by court, which set up no valid defense to plaintiff's suit, was properly thereafter stricken on oral motion made by plaintiff's counsel. 20 App. 279 (1) (92 S. E. 952).

Ejectment: Plea in abatement, in ejectment suit by vendor against vendee to recover the land, alleging pendency of suits upon purchase money notes, was properly stricken on demurrer. 148/418 (1) (96 S. E. 993).

Execution: Where sheriff wrongfully received forthcoming bond and released property taken on fl. fa. act of plaintiff of suing on bond was an election, precluding proceedings against sheriff. 144/272 (3) (86 S. E. 1080).

Illegality: Dismissal of affidavit of illegality for want of prosecution will not estop principal or surety on bond from showing as defense that mortgagor made payments which mortgagee failed to credit on execution or from showing accord and satisfaction of debt. 14 App. 180, 181 (8, 9) (80 S. E. 663).

Inconsistent remedies: Plaintiff can not concurrently pursue inconsistent remedies in same action, and if he does so without being put to an election, he can not complain that defendant's answer is responsive to both remedies. 142/22 (5) (82 S. E. 459).

Person who has elected to adopt one of two or more optional and inconsistent remedies will not thereafter be allowed to change his course and pursue a remedy inconsistent with his first election. 21 App. 526 (1) (94 S. E. 829).

Injunction: Mere pendency of petition filed by debtor to enjoin creditor from suing for personal judgment and enforcement of lien was not ground for abatement of suit by creditor for such purpose, where it did not appear that any restraining

order had been granted. 141/493, 494 (3) (81 S. E. 223).

Mortgage: Power of sale in mortgage was not extinguished by general judgment obtained by holders against maker of note in suit in city court. 146/347, 348 (3) (91 S. E. 119).

Motion to dismiss: Where pendency of former suit in same court between same parties for same cause of action was pleaded in abatement, and record of such suit was put in evidence, and there was no entry of dismissal of the suit, court was not authorized to allow counsel for plaintiff, over objection of defendant, to make entry nunc pro tunc dismissing the former suit, as of date prior to filing of second suit, although it was testified that before filing of second suit plaintiff's attorney, in vacation, paid costs of former suit and directed clerk of court to mark it dismissed. 22 App. 703 (97 S. E. 98).

Parties: Where ejectment was brought, and pending suit equitable petition was brought by plaintiff against one of the same defendants, and others privy in estate to him, for specific performance of contract between plaintiff and intestate of one defendant, whereby intestate agreed to deed or will certain realty to plaintiff, who prayed specific performance against administrator to compel execution of titles, and to enjoin cutting of timber, it was error, on trial of issue formed by plea in abatement, to allow introduction of former suit in evidence, and to direct verdict sustaining plea, and to enter judgment thereon. 148/301 (1) (96 S. E. 417).

Same cause of action: In order for pendency of former suit to be basis of plea in abatement to subsequent suit, both suits must be for same cause of action and between same parties. 148/301 (1) (96 S. E. 417).

Taxes: Where citizens sued to enjoin collection of tax on property in city and within school limits outside city, such suit, while pending, was a bar to the subsequent suit by persons who instigated the first action but refused to be named as parties therein, to enjoin the tax on the theory that attempt to establish such

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a district was unconstitutional. 142/208 (82 S. E. 547).

Title: Where both actions were for recovery of land and mesne profits, and were between same parties, plea in abatement was properly sustained, though there was some difference in character of title alleged, and in former suit there was prayer that title be decreed to be in plaintiff. 141/639, 640 (2) (81 S. E. 1035).

United States court: Pendency of action in circuit court of United States, removed from State court, for personal injuries received in Alabama, did not furnish ground for abatement of subsequent action by administrator of plaintiff for damages on account of her death. 140/368 (1) (78 S. E. 919).

General rule is that pendency of prior suit in district court of the United States is not bar to suit in State court between same parties and for same cause of action; one excep-

tion is, that where Federal court has first acquired possession of the res, or has taken steps equivalent to exercising dominion over it, that court will thereby acquire exclusive jurisdiction. 148/233 (1) (96 S. E. 424).

Waived: Act of defendant's counsel in stating defendant's contentions on the merits did not constitute waiver of plea in abatement where he stated that the plea in abatement should be first disposed of. 143/223 (4) (84 S. E. 471).

Though election of one of two inconsistent remedies is waiver of other, prosecution of improper remedy does not preclude assertion of plaintiff's real rights in subsequent action. 17 App. 645 (1) (88 S. E. 36).

Attempt to foreclose purchase-money note reserving title as chattel mortgage, being nullity, does not waive payee's right to assert title to personalty by trover. *Id.* 645 (2).

§ 4332. (§ 3738.) Pendency of suit in another State.

Stated. 140/1 (78 S. E. 340); 13 App. 799 (8) (81 S. E. 269).

Equity: Circumstance that one of the suits may be pending in court of equity and the other in court of law does not alter rule, and pendency of suit in equity will not authorize injunction against subsequent action

at law in another State in absence of equitable considerations. 140/1 (78 S. E. 340).

Parties: Applies as well where second suit is instituted by defendant in first suit as where plaintiff in both actions is the same person. 140/1 (78 S. E. 340).

§ 4335. (§ 3741.) Former judgment.

Stated. 13 App. 799 (8) (81 S. E. 269).

Cited. 149/195, 196 (99 S. E. 612).

Administrator: Judgment adverse to plaintiffs in action by heirs against purchaser of land at sheriff's sale, seeking cancellation of sheriff's deed and accounting for rent and to have title decreed in plaintiffs, will not bar ejectment against purchaser by administrator where it is necessary for administrator to have the property to pay debts. 142/198 (82 S. E. 548).

Judgment of court of ordinary granting letters dismisory to administrator with will annexed after estate had been administered, was conclusive in his favor against application for probate in solemn form,

until set aside in proceedings instituted for that purpose. 143/624 (85 S. E. 858).

Where judgment *de bonis testatoris* has been obtained against administrator, and execution has been issued thereon, and return of *nulla bona* made, judgment can not be collaterally attacked in defense to suit thereon against administrator personally, in which *devastavit* is alleged. 18 App. 384 (1) (89 S. E. 431).

General rule is that judgment *de bonis testatoris* against administrator who failed to plead want of assets is, at law, conclusive upon him of sufficiency of assets to pay debt upon which that judgment was rendered: failure to know real condition of es-

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tate, when by exercise of due diligence administrator might and ought to have known of it, will not suffice as excuse for not filing proper plea at right time. 18 App. 384, 385 (2) (89 S. E. 431).

Judgment against administrator, in action on alleged debt of intestate, when defendant has failed to plead want of assets, is conclusive as to question of sufficiency of assets to pay the debt; as to surety upon administrator's bond, judgment is not conclusive upon such question, but is *prima facie* evidence only, and when sued upon the bond the surety may plead and prove a deficiency of assets in the hands of his principal liable to payment of the debt. 21 App. 39 (1) (93 S. E. 498).

In suit against sureties on bond of administrator, *prima facie* proof of devastavit may be made by introducing in evidence the judgment against the administrator, and showing by proper entries upon execution issued thereon that there is no property upon which to levy. 21 App. 39 (2) (93 S. E. 498).

Amendment: Court of Appeals can not pass upon question as to whether trial court erred in disallowing proffered amendment to defendant's answer, where it appears that upon former trial, at preceding term of court, identical amendment was disallowed by court and no exception to that judgment was taken. 23 App. 810 (1) (99 S. E. 539).

Appeal: Where judgment of trial court is in exact accordance with decision in case on former appeal, questions presented by bill of exceptions in subsequent appeal are *res adjudicata*. 22 App. 237 (95 S. E. 718).

Ruling on former appeal as to right to institute suit on condemnation bond given in *trover* is law of the case on subsequent appeal. 23 App. 706 (5) (99 S. E. 237).

Bankruptcy: Discharge granted in bankruptcy, pending suit commenced in a State court before the bankruptcy proceedings, and duly served, is matter for plea in such suit; the enforcement of a judgment, rendered in such suit after the discharge,

will not be enjoined because of it. 141/356 (80 S. E. 1005).

Where trustee in bankruptcy appointed to succeed trustee who had resigned filed proceeding to vacate order of settlement, and his petition was dismissed on demurrer, and before time for certification of bill of exceptions had passed, the judge died, and trustee was unable to obtain certificate to bill of exceptions, *ex parte* order for rehearing granted by judge of adjoining circuit was erroneous, even if judge of such circuit could properly entertain it. 147/93 (92 S. E. 878).

Where one of the defendants in suit against two signers of promissory note makes no defense, and judgment as to him is taken by default, plea by that defendant setting up discharge in bankruptcy, filed at subsequent term during pendency of litigation as to other defendant, is mere nullity, and direction of verdict against such other defendant does not affect liability of former under original judgment against him, nor does it affect any rights which he may in fact have under such subsequent discharge. 21 App. 530 (4) (94 S. E. 850).

Burden: Where, in action to enjoin the collection of a school tax, it appeared that a former petition had been filed by the same plaintiffs and others to enjoin the same tax, the burden was on plaintiffs to prove that the former case did not furnish ground for a plea of *res judicata* or a plea in abatement. 141/476 (81 S. E. 202).

Burden was on defendant in action to cancel deeds and recover interests in land, wherein defendant pleaded former judgments in bar, to sustain his plea. 144/115, 116 (3) (86 S. E. 235).

Party relying on estoppel by judgment must show that controversy was determined and must remove by extrinsic evidence any uncertainty left in respect thereto. 144/519 (2) (87 S. E. 661).

Contract: Judgment in action for specific performance that contract was unenforceable because of insufficiency

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of description was conclusive in subsequent action to reform contract for mutual mistake of law. 142/394 (1) (83 S. E. 102).

Corporation: Former suit brought by individual and dismissed by him does not preclude corporation of which he is president from suing on same cause of action. 18 App. 419 (89 S. E. 495).

Where suit by corporation upon petition, which does not allege plaintiff's legal entity, proceeds to verdict and judgment without amendment, the defect is cured, and judgment is binding on all of the parties and their privies. 146/832 (92 S. E. 648).

Court of Appeals: Where superior court held that certiorari presented only moot questions, and there was no exceptions to ruling which Court of Appeals could consider, it must stand as law of case, binding upon both Court of Appeals and superior court, until set aside in method prescribed by law. 22 App. 190 (2) (95 S. E. 731).

Contention of deputy sheriff of city court of Dublin, as insisted upon in brief of counsel in Court of Appeals, that order committing another court official for contempt was unlawful, is without merit, where Supreme Court had decided that order adjudging such other official in contempt was illegal. 23 App. 230 (97 S. E. 883).

Decision of Court of Appeals is law of the case on subsequent trial, and necessarily controls subsequent trial so far as decision is applicable to issues then presented by pleadings and evidence. 23 App. 338 (2) (98 S. E. 232).

Where, in decision by Court of Appeals, it was expressly held that none of the questions decided arose on the trial of the first count of plaintiff's petition, affirmance of judgment overruling motion for new trial on such did not operate to determine or foreclose issues presented by second count, which were thus expressly excepted. 23 App. 338 (2) (98 S. E. 232).

Deed: No estoppel to recover compensation for services or for articles furnished resulted from judgment in former suit of same plaintiff, brought

to obtain injunction against interference with land conveyed to plaintiff in consideration of same services and articles, where defense was answer and cross-petition attacking deed as void and praying that it be set aside, on ground that grantor was mentally incompetent, and where judgment set aside the deed on that ground; no question as to plaintiff's right as to compensation for services or for articles mentioned being adjudicated or being within scope of pleadings in that suit. 20 App. 133 (92 S. E. 765).

Default: Alleged error of judge in erasing at appearance term a docket entry of default and substituting entry of "plea filed" was not sufficient ground for motion at subsequent term to strike defendant's plea; plaintiff's remedy for such error is either to except to striking of first entry or to file direct proceeding to vacate or reform second entry. 24 App. 189 (1) (100 S. E. 289).

Where in action heard before municipal judge plea to jurisdiction, motion to dismiss, and demurrer filed by part of defendants were stricken, and on nonappearance of defendants verdict went against all of them, but such verdict and judgment were set aside by another judge, on retrial before the latter judge, the plea, motion to dismiss, and demurrer were not revived, and second verdict and judgment, entered without appearance of defendants, were not open to attack as having been entered while plea, motion, and demurrer were undisposed of. 24 App. 596 (101 S. E. 760).

Demurrer: Where demurrer containing several grounds, some going to merits and some special, is sustained, judgment will be deemed to sustain entire demurrer on all grounds. 144/678 (1) (87 S. E. 889).

Where court ordered two essential paragraphs of petition stricken on demurrer unless amended, and they were not amended, but plaintiff at trial offered to amend different paragraph to set up new matter in effect and improve statement of paragraph stricken, court properly refused such offer on ground that it was *res judicata*. 17 App. 384 (87 S. E. 159).

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Judgment on demurrer, whether to petition or to answer and pleas, fixes law of case, so far as law is necessarily involved in judgment rendered, until it is reversed or overruled upon timely exceptions. 17 App. 494 (2) (87 S. E. 715).

Plea of *res judicata* properly sustained where former suit, which was dismissed on general demurrer, was by same plaintiff against same defendant and prayed for cancellation of deed to land executed by plaintiff to defendant, upon substantially same grounds as alleged in subsequent action. 145/459 (89 S. E. 422).

Where, at hearing on demurrer, judgment was entered striking portion of petition which sought to recover damages, and overruling demurrer on all other points, leaving petition to stand as action for rescission and accounting, and there was no exception to judgment striking portion of petition relating to damages, only question presented to reviewing court relates to sufficiency of petition to state grounds for cancellation and for rescission. 146/197, 198 (1) (91 S. E. 13).

Where defendant at bar and others brought action in which recovery was sought on same allegations of fact as set forth in his defense in case at bar, and judgment in that case sustaining general demurrer to petition was affirmed, judgment overruling motion to strike defendant's answer must be reversed. 146/804 (1) (92 S. E. 645).

Judgment dismissing petition upon special demurrer can not be set up as *res adjudicata*. 148/699 (98 S. E. 265).

Judgment overruling general demurrer to petition, not having been excepted to or set aside, was conclusive against demurrer, and as to her it settled law of case, involving construction of will in question. 149/758 (1) (102 S. E. 148).

Judgment overruling general demurrer filed by widow of testator to petition in suit against widow and executor of estate, which was not excepted to or set aside, settled law of the case, as to executor, involving construction of will in question. 149/758, 759 (102 S. E. 148).

Judgment upon demurrers to petition and amendment thereto was adjudication that plaintiff was entitled to recover if he proved his cause of action as set out in his writ, where such judgment was not excepted to by defendant. 18 App. 493 (1) (89 S. E. 601).

Where order sustaining demurrer conditioned upon defendant's failure by amendment, on or before specified date, to cure defects pointed out by demurrer, was not excepted to within time and in manner provided by law, it fixed the laws of the case to that extent, and where amendment offered did not comply with terms of order, court did not err in rejecting same. 19 App. 121 (1-a) (91 S. E. 241).

Where court overruled general ground of demurrer to petition, but sustained all of the special grounds of demurrer, and allowed plaintiff ten days within which to amend petition, to which ruling no exception was taken nor error assigned thereon in bill of exceptions, ruling that petition was subject to such special demurrers became law of the case. 22 App. 483 96 S. E. 332).

Where petition was attacked by demurrer upon ground that causes of action *ex delicto* and *ex contractu* were joined therein, and the court rendered judgment "that there be stricken both from the amendment and the original petition all allegations seeking to recover on grounds *ex delicto*, and the special demurrers complaining as to the general damages be and the same are hereby sustained," and there was no exception to the judgment, it became the law of the case; where, at subsequent term, plaintiff announced in open court that he did not insist on damages *ex contractu*, but insisted on damages *ex delicto*, arising out of breach of contract, not error to sustain demurrer and dismiss petition as amended. 22 App. 679 (97 S. E. 80).

Where no exception was taken to ruling sustaining demurrer to petition but allowing plaintiff twenty days in which to amend, nor error assigned thereon in bill of exceptions, ruling that petition was subject to demurrer became law of case. 23 App. 428 (1) 98 S. E. 360).

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Where former suit was brought in a name which did not import either a natural person, a corporation, or a partnership, and in which character of plaintiff's entity was not shown, and where on review of that case the reviewing court held that the demurrer pointing out such defect should have been sustained, and that for the reason indicated the suit was a mere nullity, this does not amount to former adjudication of merits of case so as to bar another suit brought by the same plaintiff as a corporation against same defendant, based upon same claim. 21 App. 45 (1) (93 S. E. 511).

If court of competent jurisdiction, in dismissing suit on demurrer, necessarily decides upon merits of case, the decision, as between the same parties and upon the same subject-matter, may be pleaded in bar of another suit. 21 App. 45 (1) (93 S. E. 511).

Where record and opinion of Supreme Court when original case was before it show that original petition filed by plaintiff was dismissed on special demurrer, and therefore that merits of case have never been passed upon, court below, trying case without intervention of jury, erred in sustaining plea of res adjudicata and dismissing petition. 21 App. 777 (95 S. E. 268).

Dismissal: Judgment of dismissal because allegations are unsupported by proof, being equivalent to nonsuit, does not preclude plaintiffs from suing anew. 144/519, 520 (4) (87 S. E. 661).

Where certiorari presents only moot questions for decision, dismissal of case can not prejudice any right of plaintiff in certiorari in any other case, whether so provided in judgment or not. 22 App. 190 (3) (95 S. E. 731).

Provision in judgment dismissing certiorari that same should be "without prejudice to the plaintiff in certiorari," etc., is binding, until reversed or set aside, alike upon the parties and upon the court, in the same or any subsequent proceeding between the same parties respecting the same subject matter. 22 App. 285 (3) (96 S. E. 500).

Ejectment: Where defendant in ejectment suit has leased portion of land to tenant who claims no other interest in land except as tenant of defendant, and where such tenant has actual notice of pendency of suit against his landlord, he will be bound by the judgment. 146/425 (1) (91 S. E. 420).

But if plaintiffs in ejectment induce tenant not to interfere in such suit, on assurance that they will recognize his right to remove building erected on the land, and they subsequently sue tenant for that part of land on which building rests, tenant will not be estopped by a former judgment from setting off his improvements under section 5587. Id.

Equity: Verdict in equitable suit filed by executors in behalf of present plaintiff's in ejectment for cancellation of deed under which defendant claims title, and for recovery of land involved in present action, was final termination of controversy. 147/427, 428 (3) (94 S. E. 468).

Evidence: Where original answer of defendant contained no plea of res adjudicata, and amendment setting up such defense was disallowed, court did not err in excluding documentary evidence offered to show that in former suit between plaintiff's wife and defendant there was an adjudication as to injuries and pain and suffering sued for; this is especially true where, upon the trial, the court distinctly instructed jury that plaintiff could not recover for any pain and suffering sustained by his wife. 23 App. 810 (2) (99 S. E. 539).

Executor: Where mortgage was given to secure debt of executor to estate, and decree was entered in suit by beneficiaries establishing amount of debt and foreclosing mortgage, which decree was affirmed, beneficiaries can not, in subsequent suit by mortgagor for accounting of payments, go into question of his liability for any items which should have been covered by former suit, whether or not decree therein was entered before time for final settlement of estate. 141/727 728 (1) (82 S. E. 451).

Right of executor to commissions, in so far as adjudicated by prior de-

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cree in suit between same parties, was not subject to attack by showing parol agreement of executor not to charge any commissions. *Id.* 727, 729, (2).

Forthcoming bond: Judgment, in action on forthcoming bond, not excepted to, is conclusive on principal and surety, preventing, on subsequent proceeding against sheriff and obligee of bond, judgment giving surety superior rights by virtue of mortgage, which defense was urged in suit on bond. 144/228 86 S. E. 1096).

Garnishment: Judgment against a garnishee, duly entered, is as to him conclusive of the proposition that plaintiff had already obtained a valid judgment against the main debtor whose effects were sought to be reached by the garnishment proceeding. 21 App. 227, 228 (1) (94 S. E. 272).

Habeas corpus: Where one institutes habeas corpus proceeding, and defendant answers but prays for no affirmative relief, dismissal of petition by plaintiff disposes of whole case, and plea of *res adjudicata* to subsequent habeas corpus proceeding by same plaintiff, based on former suit, is not sustainable. 147/501 (1) (94 S. E. 768).

Homestead: Decision on claim interposed to levy of common-law *fi. fa.* that property was not homestead of defendant in *fi. fa.* and his family, was *res judicata*, where defendant in *fi. fa.* interposed another claim as head of family, though there was mistake in description of land at trial of first claim which was cured by amendment. 141/830 (82 S. E. 236).

Where homestead was levied on under judgment against firm, and claim was interposed by head of family, member of firm, consent judgment finding part of the land subject was binding on beneficiaries of homestead, unless successfully attacked by them. 144/442 (87 S. E. 470).

Husband and wife: Decree in equity suit by wife against husband, wherein wife was declared to be entitled to possession of certain land, and husband was perpetually enjoined from interfering therewith, operates against husband personally; but it cannot be

invoked as ground for dismissal of statutory claim subsequently interposed by his children acting through him as next friend, where land is levied on under *fi. fa.* against wife. 147/415 (1) (94 S. E. 235).

Where suit was brought in name of husband and wife, and judgment wife was declared to be entitled to husband personally; but it can not be rendered in their favor, and *fi. fa.* was paid to their attorneys of record, and, while fund was in hands of latter, summons of garnishment, based on judgment against husband, was served on attorneys and, by agreement, counsel fees were allowed them, and half of remainder of fund was paid to wife, and attorneys answered the garnishment, setting up that money was property of wife, attorneys and husband and wife could not attack judgment by setting up that husband had no title, except for reasons arising after filing of suit, etc. 18 App. 459 (2) (89 S. E. 534).

Identity of cases: Where pleadings include an issue which might or might not be taken as having been determined by verdict and judgment, one setting up judgment by way of estoppel may show by extrinsic evidence that issue thus included was then in fact actually litigated, and therefore was determined by the judgment. 22 App. 454 (96 S. E. 329).

Where plea of estoppel by former judgment is entered, and record of previous case shows that issue at present involved was included among issues made by pleadings in former case, and that evidence upon that issue was in fact submitted and contest made thereon at former trial, issue must be taken as having been previously litigated, and general judgment in former suit becomes bar by estoppel to subsequent contest upon same issue. 22 App. 454 (96 S. E. 329).

Illegality: Where questions raised in affidavit of illegality were substantially same ones previously raised in motion to set aside verdict and judgment in case, which motion was overruled, and judgment overruling motion was not excepted to, and time for accepting had expired, former judgment

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concluded defendant as to issues raised in affidavit of illegality. 19 App. 674 (1) (91 S. E. 1070).

Where questions raised in affidavit of illegality were substantially same ones previously raised in motion to set aside verdict and judgment in case, which motion was overruled, and judgment overruling motion was not excepted to, and time for excepting had expired, former judgment concluded defendant as to issues raised in affidavit of illegality. 19 App. 674 (1) (91 S. E. 1070).

Inconsistent remedies: When person has two or more conflicting and inconsistent remedies for same wrong, his election and actual prosecution of the one to a favorable or an adverse decision is a bar to the other. 20 App. 325 (2) (93 S. E. 27).

In the case of conflicting and inconsistent remedies, remedies are not concurrent, and where choice between them is once made, with knowledge of all the facts, right to follow the other is forever gone. 20 App. 325 (3) (93 S. E. 27).

Intoxicating Liquor: Where State institutes action to condemn automobile under section 448 (oooo) P. C., and action is resisted by interposition of a claim, if defendant was person who had been indicted and acquitted of charge under section 448 (vvv) P. C. based on same transaction, verdict of acquittal founded on illegal possession of liquor seized with the automobile is admissible in support of the claim; where claim is interposed by third person, general rule is that verdict of acquittal, though based on same transaction, is inadmissible. 149/195 (99 S. E. 612).

Issues: Amendment to defendant's answer setting up matters determined by prior judgment was properly refused. 14 App. 180 (2) (80 S. E. 549).

It is too late, after judgment binding on defendant, to urge matters of defense which should have been pleaded in the cause, as ground for enjoining enforcement of judgment. 146/127 (3) (90 S. E. 958).

Joint obligors: Recovery against one joint obligor merges entire cause of

action and bars any subsequent suit on the same obligation against any of the other debtors, or against all jointly. 140/26 (1) (78 S. E. 345).

Judgment in action on joint contract against a joint obligor merged entire cause of action, and barred any subsequent suit on the same contract against the other debtor. 13 App. 792 (79 S. E. 1131).

Judgment against one of two joint and several obligors which had never been satisfied is no bar to suit against the other. 21 App. 530 (3) (94 S. E. 850).

In suit against both of the signers, on a joint and several promise to pay, judgment by default against one does not terminate suit against the other, where the latter, by his silence, consented to a severance. 21 App. 530 (3) (94 S. E. 850).

Where general verdict in favor of defendants was rendered in joint suit on unconditional contract against five defendants, four of whom filed sworn defenses, and judgment was entered in favor of such four defendants, no judgment being entered for or against the fifth defendant, demurrer to motion of plaintiff to enter judgment in its favor against such fifth defendant was properly sustained and motion dismissed. 22 App. 156 (95 S. E. 751).

Jurisdiction: Where original petition showed total want of jurisdiction, and there was no attempt to serve amendment or amended petition upon defendant, and no appearance or waiver by him, he was not concluded by final verdict and judgment rendered without proof, even though amended petition may have alleged necessary jurisdictional facts. 21 App. 741, 742 (9) (95 S. E. 19).

Jury: Where issue raised by plea of res judicata was for jury, error to sustain plea and dismiss petition, instead of submitting to jury evidence on issue raised by plea. 17 App. 572 (2) (87 S. E. 842).

Lien: Judgment for defendant in laborer's lien foreclosure is res judicata only as to particular debt involved, and does not prevent plaintiff from thereafter suing defendant for items of debt of different na-

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ture, though testimony as to these debts was given in lien case. 17 App. 526 (2) (87 S. E. 812).

Motion: Where motion to set aside verdict and judgment upon ground that they were obtained by fraud was dismissed on ground that motion was not proper remedy, such adjudication would not preclude movant from attacking judgment in petition properly brought and based upon sufficient grounds. 145/481 (1) (89 S. E. 574).

Municipal court: Judgment of appellate division of municipal court of Atlanta, in so far as it attempted to decide whether or not trial judge erred in striking portion of counter affidavit which attempted to recoup damages against demand of plaintiff, and to adjudge that alleged damages might be considered in abatement of rent claim, was not within purview of its powers, and hence constituted no binding judgment which would preclude plaintiff from urging like objection to such plea of recoupment at subsequent trial. 18 App. 636 (1-a) (89 S. E. 1099).

Municipal officers: Where removed municipal officer brought certiorari to set aside judgment of mayor and aldermen, which was rendered judicially, and pending certiorari term of office expired, and defendant city moved to dismiss certiorari, and court sustained motion but expressly provided in judgment that it should be without prejudice to plaintiff in suit for salary, judgment complained of in petition for certiorari must stand upon same footing as if municipal authorities had acted ministerially and not judicially; their judgment not being conclusive of question in court as to salary. 22 App. 285 (3) (96 S. E. 500).

New trial: Where, in former suit between same parties, and relating to same subject matter, judgment was rendered against defendant, and its motion for new trial was overruled, and judgment overruling such motion was affirmed by Court of Appeals by dismissal of bill of exceptions assigning error thereon, and defendant brought petition to review and set

aside original judgment, petition was properly dismissed on general demurrer, when it appeared that grounds for review were known, or could by reasonable diligence have been discovered, in time to incorporate them in motion for new trial made in former case. 21 App. 682 (94 S. E. 903).

Parties: Judgment in action to recover land against one of two defendants, plaintiff having dismissed as to other, was not *res judicata* in subsequent action by same plaintiffs against defendant who was dismissed. 141/600 (81 S. E. 899).

Decree adversely affecting defendant's title is inadmissible against him where there is no evidence that defendant or his predecessors were parties to decree. 143/563 (1) (85 S. E. 856).

Recitals in judgment on issues in money rule proceeding holding that *fi. fa.* relied on by claimant was void was not binding on another creditor of same defendant, who was not party to such rule. 144/713 (1) (87 S. E. 1056).

Judgment can not be basis of plea of *res judicata* in action wherein parties are not same though cause of action is same. 16 App. 43 (3) (84 S. E. 494).

Judgment is not conclusive as to one who was not party to proceeding in which it was rendered, nor as to one over whom court acquired no jurisdiction, even though latter may be named as party defendant in the proceeding. 21 App. 741, 742 (9) (95 S. E. 19).

Partition: Where one tenant in common brings equitable action against cotenants for partition and for accounting of rents, issues, and profits, and consent decree is taken, fixing rights and liabilities of parties as between themselves, and decreeing their respective interests in land, in further progress of case, where decree is not attacked, parties will not be permitted to go behind decree so as to reopen subject. 146/763 (92 S. E. 521).

Partnership: Judgment against plaintiffs by creditor of dissolved partnership was admissible to show debt

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paid by partners for persons alleged to have assumed firm liabilities and to be liable to plaintiffs in consequence thereof. 15 App. 794 (2) (84 S. E. 226).

Dismissal of action against partnership is no bar to action against firm of same name not comprising same individuals. 16 App. 43 (2) (84 S. E. 494).

Plea of estoppel by judgment should allege all facts and exhibit all record essential to show that plea is meritorious. 14 App. 288 (2) (80 S. E. 789).

Plea in abatement, filed by defendant and allowed by court, which set up no valid defense to plaintiff's suit, was properly thereafter stricken on oral motion made by plaintiff's counsel. 20 App. 279 (1) (92 S. E. 952).

Where plea of res adjudicata could have been filed at appearance term of case, it is too late to file it at trial term. 24 App. 578 (2) (101 S. E. 763).

Where case was returnable to February term, 1917, of trial court, and original answer was filed February 6, 1917, amendment thereto, setting up plea of res adjudicata, tendered June 6, 1919, at trial term, showing that judgment relied on as bar was rendered on December 7, 1916, so that plea could not be filed at appearance term in February, 1917, was properly disallowed. 24 App. 578 (2-a) (101 S. E. 763).

Scire facias: On general principle of res adjudicata, defendant who was served and who appeared and pleaded is absolutely precluded from going behind judgment and offering in defense to the scire facias any matter which existed before rendition of original judgment in which might have been presented in former proceeding. 22 App. 388 (2) (96 S. E. 7).

Set-off: Judgment in justice's court for defendant in action for damages by collision between automobiles did not preclude defendant, under section 4336, in view of section 4759, from suing in another court for his damages, where such amount was beyond justice's jurisdiction. 17 App. 679 (2) (87 S. E. 1091).

Subrogation: Recovery in suit on right of subrogation under the law is not

barred by fact that plaintiff's predecessors recovered judgment against defendant for same cause of action, when it appears that right of subrogation and agreement therefor antedated filing of suit in which recovery was had, and that judgment did not cover items of damage to which plaintiff was subrogated. 18 App. 341 (1) (89 S. E. 438).

Generally single cause of action with several elements of damage admits of but one action, where there is identity of subject matter and of parties; these two elements of identity being wanting, judgment rendered in former suit, brought by predecessor of one claiming under subrogation accruing before bringing of that suit, does not operate as res adjudicata as to rights of latter in subsequent suit to enforce his right of subrogation. 18 App. 341 (2) (89 S. E. 438).

Judgment of court of competent jurisdiction is conclusive between parties to case and their privies as to all matters put in issue or which could legally have been put in issue; but one with right of subrogation accruing before bringing of suit in which judgment was rendered is not a privy, so as to be concluded by judgment, especially when right of subrogation is claimed on item of damage expressly excluded from that suit. 18 App. 341, 342 (3) (89 S. E. 438).

Supreme Court: Where there is no substantial difference between case on second appeal and that on first appeal, rulings on former appeal become law of the case, binding on both the trial court and the reviewing court. 18 App. 491 (1) (89 S. E. 605).

Taxes: Where act of legislature authorized levy of local school tax, when adopted by voters of county, and county authorities were about to levy tax under it, final judgment in suit by taxpayer to declare election void and enjoin levy, was conclusive on same plaintiff in action to enjoin collection of taxes under such levy. 142/205 (82 S. E. 529).

Application by one who had advanced money to pay taxes on railroad properties for order authorizing receiver to pay such taxes was properly

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refused, priorities of liens having been fixed by order of court which confirmed sale of such properties and it not being sought to have the order reopened. 149/146 (99 S. E. 859).

Tort: Patient electing to sue in tort for physician's malpractice, and actually commencing and prosecuting action to final adverse decision, loses his right to sue as for breach of contract or breach of duty imposed by law; this is true although at time of commencement of action for tort it was barred by statute of limitations; election to sue in tort and prosecution to final judgment relates back to original transaction out of which action arose,

and constitutes irrevocable action between remedies as then existed. 20 App. 325 (4) (93 S. E. 27).

Trustee: One bringing suit as trustee for certain children, including himself, is estopped by judgment rendered. 144/115, 116 (2) (86 S. E. 235).

Usury: Where debtor's trustee in bankruptcy failed to plead usury in proceeding to subject to bankruptcy administration land conveyed by debtor, and court adjudged deed to be valid, bankrupt was estopped from asserting invalidity of deed on ground of usury. 17 App. 246 (1) (87 S. E. 649); 19 App. (394 (91 S. E. 490).

ARTICLE 7.

Of Set-Off and Recoupment.

§ 4339. (§ 3745.) **Set-off.**

Cited. 19 App. 566, 568 (91 S. E. 904).

City courts have no jurisdiction to allow equitable set-off. 13 App. 502 (2) (79 S. E. 374).

Equity: Except as limited by section

5521, right of set-off is a purely equitable right, cognizable only in court of equity. 13 App. 502 (2) (79 S. E. 374).

§ 4340. (§ 3746.) **What may be set off.**

Cited. 19 App. 566, 568 (91 S. E. 904).

Agent: Allegations in answer in city's action on note that persons who did grading for city promised to prevent accumulation of water in defendant's yard and failed to keep such promise, did not show such mutual demand as to authorize defense under this section. 14 App. 72 (2) (80 S. E. 339).

Breach of warranty: Defendant, in action for price of trees sold, could set off his damages from being compelled to pay notes in hands of innocent purchasers, given by defendant for trees previously bought, but not as warranted, though notes were paid after discovery of the breach. 13 App. 352 (1) (79 S. E. 212).

Where answer failed to state when notes were given, or to whom they were transferred, or to state facts from which it could be determined whether holder was an innocent pur-

chaser, such answer was demurrable. Id. 352 (2).

Contract: Discount on price of cars purchased and commission on price of cars sold are so inconsistent as to be incapable of enforcement at same time by way of set-off, unless it be alleged that there was to be discount and commission in addition thereto. 15 App. 453 (83 S. E. 642).

Contract could not be basis of set-off where it appeared that minds of contracting parties did not meet at same time in same sense. Id.

Distress warrant: Plea of set-off to distress warrant, alleging items of indebtedness apparently independent of rent contract, and not alleged to be connected with it, is not allowable. 143/181 (84 S. E. 438).

Where both landlord and tenant claim damages for failure of other to perform mutual stipulations of contract, charge that damages on

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one side should be set off against those on other, and only net amount should be allowed tenant as a deduction from the amount of the distress warrant, was proper. 13 App. 392 (3) (79 S. E. 246).

Ex contractu action: In action on contract claim arising *ex contractu* may be counterclaimed, as may one arising *ex delicto* where plaintiff is non-resident corporation. 144/21 (1) (85 S. E. 1020).

Right of action *ex delicto* can not be used as set-off in proceeding *ex contractu*. 141/565, 566 (4-b) (81 S. E. 886); 13 App. 276, 277 (4) (79 S. E. 167); 15 App. 352 (1) (83 S. E. 275).

Claim arising *ex contractu* can not be set off against claim arising *ex delicto*. 13 App. 502 (1) (79 S. E. 374).

Where, in action *ex contractu*, cross-action is filed by defendant setting up conversion of defendant's property by plaintiff, such cross-action can not be maintained unless it is affirmatively shown that such property has been converted into money; unless this fact is shown, the cross-action can not be construed as an action for money had and received, and a waiver of the tort, but will be construed as an action *ex delicto*, which ordinarily can not be maintained as a cross-action in an action *ex contractu*. 21 App. 297 (1) (94 S. E. 317).

Landlord: Refusal of charge that jury could find as set-off repairs and improvements made during period embraced in rental contract was not error. 16 App. 802 (86 S. E. 391).

Action here by cropper for proceeds of crop after payment of advances made was held action *ex contractu*, permitting pleading as set-off claims arising *ex contractu*. 145/588 (1) (89 S. E. 698).

Liquidated demand: In proceeding on *fi. fa.* for amount due by abutting owners for paving, conclusion in affidavit of illegality that no amount was due could not be supported by alleged fact that affiants' property had been damaged by change of grade more than amount of *fi. fa.*, as an unliqui-

dated demand against a judgment demand could not be so set up. 24 App. 115, 116 (1-a) (100 S. E. 74).

Mistake: Defendants may set off against plaintiff's demand money paid by mistake, it appearing that mistake could be corrected without injustice to plaintiff. 13 App. 453 (1) (79 S. E. 363).

Necessaries: Where parent sues one, who without his consent employed his minor son, for value of services, defendant may set off value of necessities, supplied to minor. 13 App. 458 (3) (79 S. E. 356).

Partnership: In action by partnership for price of partnership property sold by one partner, defendant could not plead a set-off based on contract made with one partner in his individual capacity. 13 App. 457 (2) (79 S. E. 246).

In suit by individual upon open account due him debtor can not set off claim due by corporation or partnership of which individual creditor is member. 24 App. 663 (101 S. E. 768).

Principal and surety: In action on note given by principal and sureties defendants may set off unliquidated damages flowing from breach of independent contract between plaintiff and principal, and competent testimony tending to support this plea should not be repelled. 24 App. 798 (1) (102 S. E. 452).

Specific chattels: In action to recover specific chattels, no counterclaim is possible, unless perhaps, equitable relief may be awarded under some very exceptional circumstances. 23 App. 731 (1) (99 S. E. 314).

Time: Plea of set-off is not good unless it alleges facts showing that demand against plaintiff which defendant seeks to set up was in existence and due to latter by former at time his action was begun. 24 App. 418, 419 (2-a) (101 S. E. 1).

Where defendant's claim for rent largely forming basis of damages arising *ex contractu*, pleaded as set-off, was not due at commencement of suit, city court was without jurisdiction to entertain such part of plea. 24 App. 418, 419 (3) (101 S. E. 1).

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Tort: Damages for torts can not be set off in action on contract, and can be set off only in court having equitable jurisdiction. 14 App. 72 (1) (80 S. E. 339).

Right of one sued at law in action ex contractu to set off damages arising out of tort committed by plain-

tiff, on ground that latter is insolvent or is non-resident, is right recognized only by court of equity. 24 App. 418 (1) (101 S. E. 1).

Trover: In trover suit plea setting up debt claimed by defendant against plaintiff should not be allowed. 13 App. 502 (3) (79 S. E. 374).

§ 4341. (§ 3747.) **Mutual debts.**

Cited. 19 App. 566, 568 (91 S. E. 904).

Administrator: Claims due defendant, surety on bond of original administrator, from heirs of estate can not be set off against judgment on bond recovered by administrator de bonis non. 144/8, 9 (3) (85 S. E. 1048).

Guardian and ward: It is not error, in suit against one as guardian of property of his ward's estate, for trial judge to strike plea setting off liability to guardian individually. 22 App. 394 (3) (95 S. E. 1004).

Where, in suit against one as guardian of property of his ward's estate, plea sets off note showing on its face that it is individual liability of plaintiff to guardian, but alleges that amount represented by note was money of ward, and that it was loaned as such, not error to exclude evidence proffered to support plea; nor is it error to refuse to admit note in evidence, upon objection that there was no authority on part of guardian to loan

ward's money. 22 App. 394 (4) (95 S. E. 1004).

Notes: Plea here in action on notes held demurrable as undertaking to set up plea by way of set-off and recoupment of debts not between same parties and in their own right, defendant having by her answer admitted validity of notes and amount due on them. 23 App. 687 (99 S. E. 225).

Partnership: Defendants in suit on promissory note against two persons may file plea alleging that note, though purporting to be signed by them in their individual capacity, evidenced debt due by partnership, of which signers were the only partners, and thereupon plead as set-off an account alleged to be due by plaintiff to the partnership. 18 App. 206 (1) (89 S. E. 156).

In suit by individual upon open account due him debtor can not set off claim due by corporation or partnership of which individual creditor is member. 24 App. 663 (101 S. E. 768).

§ 4344. (§ 3750.) **Set-off against negotiable note.**

Cited. 19 App. 566, 571 (91 S. E. 904).

Charge on counterclaim and set-off not injurious to defendants where jury reduced amount claimed by plaintiff, by allowing, as credits on notes sued on, various items of the account pleaded as a set-off 13 App. 119 (1) (78 S. E. 862).

Use of the terms "paid" and "payments" in instruction in action on note was harmless, where it was perfectly plain that judge was referring to defense of set-off which was the only one relied on. Id. 119 (4).

Transferee: Plea of set-off to note traded after maturity can not be founded on any mutual demand that defendant had at commencement of suit against payee, but must be confined to contract sued on by plaintiff. 144/335 (87 S. E. 21).

If holder of negotiable instrument receives it after it is due, its non-payment at maturity is notice to him of dishonor, and he takes it subject to all the equities existing between the original parties thereto, arising out of and connected with the original contract. 21 App. 696 (94 S. E. 902).

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§ 4347. (§ 3753.) **Set-off of improvements.**

Life estate: One who took interest in land under devise by previous life tenant can not, as against one entitled to interest under will of original

testator, set off valuable improvements made by life tenant. 145/430, 431 (4) (89 S. E. 418).

§ 4348. (§ 3754.) **Effect of dismissal after set-off filed.**

Cross action: Where court granted motion of plaintiff to dismiss its action in trover, it was not error to rule that such dismissal carried with it the defendant's cross action for damages. 23 App. 731 (4) (99 S. E. 314).

Improper set-off: Where plaintiff sought

merely to enjoin enforcement of f. fa. based on judgment obtained by fraud, and defendant's set-off was wholly unrelated to any matter pleaded by plaintiff, dismissal of petition terminated cause. 144/690 (87 S. E. 917).

§ 4349. (§ 3755.) **Debts not due may be set off, when.**

Insolvency: Defendant's plea of plaintiff's non-residence or insolvency, and his prayer for judgment in excess of plaintiff's demand, involves affirmative

equitable relief, and city court has no jurisdiction to entertain the plea. 24 App. 418, 419 (2-b) (101 S. E. 1).

§ 4350. (§ 3756.) **Recoupment.**

Cited. 17 App. 779, 782 (88 S. E. 703).

Architect: On plea of recoupment in architect's action for balance due him, burden of proof was on defendant owners. 144/145, 146 (1) (86 S. E. 316).

Any damages resulting from negligent performance of contract by architect was matter of recoupment in architect's action for balance due him. Id.

Charge: Defense set up by way of recoupment in action of trespass, whereby defendant sought to recover expenses alleged to have been incurred in guarding skidder, by reason of alleged previous words, acts, and threats of plaintiff, should not have been limited by charge of court to proof of his previous acts. 22 App. 386 (2) (95 S. E. 996).

Where evidence showed that purchaser of automobile waived any defects therein after he had run it for some time by signing one of a series of notes for purchase price, which had been overlooked when trade was made, without plaintiff's calling attention to defects in car or offering to rescind trade, any error in failing to charge on recoupment was harmless. 24 App. 468, 469 (4) (101 S. E. 399).

Collateral: Where collateral given to secure note sued on has been converted by plaintiff, defendant may recoup value of converted security as against payment of note. 17 App. 631 (1) (87 S. E. 918).

Definition: Recoupment is right of defendant to have deduction from amount of plaintiff's damages, for reason that plaintiff has not complied with cross-obligation arising under same contract. 14 App. 668 (1) (82 S. E. 153).

Demurrer: Plea of recoupment here in action for materials furnished under contract was not subject to general demurrer, but was subject to special demurrer calling for more specific statements of damages sought to be recovered. 142/375, 376 (2) (82 S. E. 1062).

Landlord and tenant: In railroad company's action for rent of land used for sidetrack, damages from plaintiff's failure to furnish cars could not be set-off by way of recoupment where they arose, if at all, from plaintiff's failure to comply with its obligations as regulated by railroad commission, pursuant to section 2664 et seq. 14 App. 668 (2) (82 S. E. 153).

Of set-off and recoupment.

Damages arising from alleged contract to reduce amount of rent in suit, and damages based upon contract to build certain warehouse for defendant, which plaintiff violated, though referring to original rent contract represented by notes in suit, can not be pleaded in suit upon such notes, for reason that contract set up in answer is not contract sued upon, but is independent of notes sued upon. 18 App. 391 (2) (89 S. E. 435).

Liquidated damages: Contract to furnish lumber providing that if seller failed to fill order as specified he would pay buyer an amount equal to his losses did not limit damages to such amount as would reimburse buyer for any money required to be paid as liquidated damages for delay in completing structure. 142/375, 376 (3) (82 S. E. 1062).

Mortgage: In proceeding to foreclose chattel mortgage, mortgagor may by affidavit of illegality avail himself of any defense which he might set up in ordinary suit upon demand secured by the mortgage, and which goes to show that amount claimed is not due and owing; while mortgagor is thus permitted to avail himself of valid defense by way of recoupment, he is not entitled to plead defense of set-off in such a summary proceeding since latter defense is not one which goes to justice of plaintiff's demand. 22 App. 441 (3) (96 S. E. 183).

Note: Where, in action on notes given for fertilizer, plaintiff permitted defendants to prove without objection that fertilizer for which one note was given was worthless, damages could be allowed under plea of recoupment, though note in terms expressly excluded warranty of fertilizer. 14 App. 371 (6) (80 S. E. 858).

§ 4351. (§ 3757.) **Differs from set-off.**

Stated. 14 App. 668, 670 (82 S. E. 153).

§ 4352. (§ 3758.) **For what it lies.**

Fraud: Buyer can not recoup for fraudulent representations as to habits of mule where purchase-money note expressly stated that seller insured only

Allowance of damages by way of recoupment was unauthorized where testimony to support same was purely speculative and conjectural. *Id.*

Counter-claim here for unliquidated damages from breach of undertaking to accept certain property in payment of note sued on, under later contract made by plaintiff presumably after maturity of note, though considered as plea of recoupment, was not maintainable. 17 App. 566 (2) (87 S. E. 846).

Fact that purchaser afterwards gave notes for remainder of purchase price then unpaid would not prevent him from setting up, by way of recoupment, claim for damages based on alleged deficiency in weights of diamonds purchased, since damages arose out of original contract of purchase. 19 App. 125 (2) (91 S. E. 214).

Scope: Recoupment can only be pleaded in action ex contractu when for any reason plaintiff is liable to defendant on contract sued upon. 18 App. 391 (1) (89 S. E. 435).

Recoupment, as a defense, must spring out of the contract upon which plaintiff sues, and is confined to that; any cross-obligation or independent covenant arising under that contract would be available as a defense, but defendant can not by plea recoup under a different and independent contract. 20 App. 755 (3) (93 S. E. 271).

Trover: In action of trover, recoupment in nature of damages can not be pleaded by defendant, nor adjudicated, unless some special equity, such as non-residents or insolvency of plaintiff, is shown. 23 App. 731 (2) (99 S. E. 314).

the title, without showing that buyer was misled as to contents of note. 143/602 (85 S. E. 764).

Of set-off and recoupment.

§ 4353. (§ 3759.) **Where it lies.**

Automobile dealer: Even if suit against distributor to recover deposit made under dealer's contract be construed as claim under terms of executed contract yet on consideration of its object and that agreement is inchoate as to any purchase and sale, dealer's failure to specify and order out any of cars to be furnished any distributor would not therefor constitute such non-performance on dealer's part as to prevent his recovery of bonus paid in under its terms, nor could such failure be pleaded by way of damages in answer to such suit. 24 App. 638, 639 (3) (102 S. E. 47).

City court has jurisdiction to entertain plea of recoupment and to give judgment for the excess. 20 App. 36 (1) (92 S. E. 397).

Where defendant's answer shows that her claim against bank, which she pleaded as set-off against claim upon which she was being sued by receiver, arose out of an express contract with the bank and in regard to very claim upon which she was being sued, city court had jurisdiction to entertain the plea and to render judgment for defendant. 20 App. 36 (4) (92 S. E. 397).

While city court has no jurisdiction to grant affirmative equitable relief, it may entertain jurisdiction of equitable plea purely defensive in its nature, which upon being sustained would result simply in a general verdict in favor of defendant. 20 App. 36, 37 (5) (92 S. E. 397).

Foreign corporation doing business in Georgia and having agents therein for that purpose is non-resident corporation within meaning of rule that in action of trover recoupment in nature of damages can not be pleaded nor adjudicated unless some special equity, such as non-residence of plaintiff, is shown. 23 App. 731 (3) (99 S. E. 314).

Interest: Where it appeared that notes were given for part of purchase price of land, with house thereon uncompleted when notes were given, that the seller agreed to complete the house

and to pay purchaser amount equal to interest on the notes and on certain mortgage against property until completion of house, such agreement being made in consideration of the buyer's closing up the trade and signing the notes then, and that the house was not completed until a named date, the purchaser could not set off the amount of such interest in an action on the notes. 23 App. 276 (97 S. E. 862).

Justice court: Where plea in recoupment in suit on contract seeks damages for breach of warranty rather than in tort, recovery may be had for excess of demand of defendants over that of plaintiff, not exceeding jurisdiction of justice. 17 App. 779 (2) (88 S. E. 703).

No notice to plaintiff of filing plea of recoupment is necessary to authorize trial in justice court in absence of plaintiff without legal excuse. *Id.* 779 (3).

Landlord and tenant: In railroad company's action for rent of land used for sidetrack, damages from plaintiff's failure to furnish cars could not be set off by way of recoupment where they arose, if at all, from plaintiff's failure to comply with its obligations as regulated by railroad commission, pursuant to section 2664 et seq. 14 App. 668 (2) (82 S. E. 153).

Note: Counter-claim here for unliquidated damages from breach of undertaking to accept certain property in payment of note sued on, under later contract made by plaintiff presumably after maturity of note, though considered as plea of recoupment, was not maintainable. 17 App. 565 (2) (87 S. E. 846).

Trover: Where, in suit to recover personal property, defendant claims title by reason of purchase from plaintiff, and claims that under contract of purchase portion of agreed price has been paid and remainder tendered, and elects to take money verdict, finding

Of limitation of actions on contracts; periods of limitation.

for him in amount of such payment, upon which judgment is rendered against plaintiff and his surety on the statutory bond, is not contrary to law. 20 App. 733 (1) (93 S. E. 280).

Defendant in bail-trover, claiming title to property sued for, who prevails in the suit, is not precluded from exercising his right to take money judgment, in lieu of the property, against plaintiff and surety on stat-

utory bond given by plaintiff. 20 App. 733 (1) (93 S. E. 280).

Where plaintiff had instituted bail trover action against a defendant, the defendant could not in same case, by way of recoupment, recover damages for alleged malicious use of the legal process, since proceeding complained of had not terminated in defendant's favor. 24 App. 402, 403 (5) (100 S. E. 766).

ARTICLE 8.

Of Limitation of Actions on Contracts.

SECTION 1.

Periods of Limitation.

§ 4354. (§ 3760.) On foreign judgment.

Revived: Action brought after more than 13 years on judgment rendered in another State was barred, where it appeared that judgment never be-

came dormant under laws of that State, and therefore could never be legally revived. 17 App. 468 (1) (87 S. E. 697).

[§ 4355. (§ 3761.) Repealed by Acts 1910, p. 121. See § 4357 (a) and note.]

Execution: Where more than seven years had elapsed since rendition of judgment, and no valid execution having been issued thereon, judgment became dormant. 147/265 (4) (93 S. E. 418).

Levy: Where execution which plaintiff was attempting to enforce was dor-

mant, not having been kept in life under this section, court did not err in dismissing levy upon motion of claimant. 146/606 (91 S. E. 688).

Mortgage: Judgments on foreclosure of mortgages are not within dormant judgment statute. 144/100 (3) (86 S. E. 241).

[§ 4356. (§ 3762.) Repealed by Acts 1910, p. 121. See § 4357 (a) and note.]

Fraud: Plaintiff in suit to subject fund representing purchase money due from innocent vendee to debtor's fraudulent transferee was not guilty of laches, where action was brought

about five years after transactions complained of, the fraud not being discovered until month before suit. 144/377 (5) (87 S. E. 293).

[§ 4357. (§ 3763.) Repealed by Acts 1910, p. 121. See § 4357 (a) and note.]

Mortgage: Judgements on foreclosure of mortgages are not within dormant

judgment statute. 144/100 (3) (86 S. E. 241).

Periods of limitation.

§ 4357 (a). **Dormancy of judgments.** [Any judgment hereafter rendered in this State shall become dormant and shall not be enforced, if seven years elapse before execution is issued thereon and entered on the general execution docket of the county wherein such judgment is rendered. Such judgment shall likewise become dormant if seven years shall elapse at any time after said execution is issued thereon without an entry on the execution by an officer authorized to execute and return the same, and such entry recorded on said docket, [and a second record of said entry shall be made on the general execution docket of the date said return is filed, in addition to the entry which is made on the docket of the date that the execution was originally entered; provided, however, that no second record need be made on the general execution docket if the date that the entry is filed is less than seven years from the date of the execution;] (a) with the date of such record entered by the clerk. It shall not hereafter be necessary in order to prevent such dormancy that such entry be recorded, or such execution entered on any other [dockets.] (a) Such judgment may be revived by scire facias or sued on within three years from the time it becomes dormant.]

Acts 1910, p. 121. (a) Acts 1920, p. 81.

Though the Act of 1910 does not expressly repeal sections 4355-4357, there seems to be no doubt that those sections are repealed by the Act. They have therefore been stricken out. The requirements of the new law, however, seem to be the same as those of the repealed sections, except as to the docket upon which entries are to be made.

Docket: To prevent dormancy, entry of officer authorized to execute *fi. fa.* must be recorded on execution docket of court from which execution issued, within seven years from rendition of judgment; and date when recording on docket took place must appear from inspection of docket itself. 149/59, 60 (2) (99 S. E. 31).

Entry on back of *fi. fa.* "Entered on the general execution docket, page 164, this 28 day of Sept., 1907," was not a sufficient compliance with sections 4355 and 4357 to prevent dormancy of execution after expiration of seven years from date of rendition of judgment. 140/651 (79 S. E. 568).

Justice's court *fi. fa.*, kept in life

by proper entries of levying officer in county in which judgment was obtained and *fi. fa.* was issued, and afterwards "backed" by justice of peace in another county for purpose of levy, and levied on land in county where it was "backed," it is not dormant for reason that previous entries on *fi. fa.* were made prior to its being "backed." 147/14 (1) (92 S. E. 647).

Mortgage: While, so far as a judgment of foreclosure may purport to be a general personal judgment, it is dormant because of failure to issue execution in terms of statute relating to dormancy, it is valid and enforceable as a decree foreclosing mortgage. 140/249 (1) (78 S. E. 848).

Revive judgment: Bona fide attempt to enforce dormant execution, except by scire facias or suit commenced within time prescribed, was unavailing to revive it. 149/59, 60 (3) (99 S. E. 31).

Time: This section has no application to a judgment rendered in 1900. 149/59, 60 (1) (99 S. E. 31).

Periods of limitation.

§ 4358. (§ 3764.) **Motions to set aside judgments and decrees, made when.**

Applied. 17 App. 517 (87 S. E. 770).

Appearance term: Judgment entered up at appearance term of city court of Quitman, valid plea having been filed and jury trial demanded at or before call or appearance docket, was voidable and could be set aside on motion timely made at next term of court. 21 App. 594, 598 (94 S. E. 831).

Intervenors: Where decree in receivership proceedings against company established certain claims, and property was sold, intervenors who three years thereafter elected to follow proceeds of sale were not entitled to attack decree on grounds which might have been pleaded by company. 147/527 (94 S. E. 1003).

§ 4359. (§ 3765.) **On specialties.**

Administrator's bond: Equitable action brought in 1917 upon administrator's bond, against sureties alone, in which petition alleged that married woman died intestate, leaving her husband sole heir at law, that in 1885 administrator was appointed, who gave bond with two sureties, that in 1887 administrator sold certain land, proceeds from which were never reported or paid over to the heir, that the administrator died and there was no administration upon his estate, that the administrator came into possession of such money, was barred by limitations. 148/307 (96 S. E. 568).

Bill of lading: Action for damages for breach of contract made by bill of lading is barred in four years. 264 Fed. 355 (3).

Bond for title: Action for damages for breach of bond for title, being demand founded on sealed instrument, is not barred until twenty years after breach. 20 App. 309 (1) (93 S. E. 70).

Indemnity: Petition in action on bond under seal was not demurrable, though defendant may have collected accounts covered by bond more than five years prior to suit. 16 App. 693 (1) (85 S. E. 970).

Bond here stipulating that principal would pay over amount of notes collected, demurred to so much of

Term time: Where it does not affirmatively appear on face of motion to set aside default judgment, or from evidence submitted on hearing, that motion was made in term time, it should be dismissed; order of court overruling motion will be construed as a dismissal. 24 App. 407 (100 S. E. 755).

Vacation: Where motion to set aside judgment was presented to judge of superior court at chambers, and bill of exceptions recites that it was made in vacation after court had adjourned, proceeding was nullity, and judge had no authority to entertain motion. 20 App. 617 (93 S. E. 218).

answer as set up statute of limitations which had run against notes was properly sustained. Id. 693 (2).

Sealed instrument: Contract in writing, not reciting that it was under seal, was not a sealed instrument, although after the signatures were written the letters "L. S." inclosed in brackets. 144/33 (1) (86 S. E. 242).

Printed "L. S." following signature is sufficient mark. 18 App. 450, 451 (6) (89 S. E. 587).

Where note and mortgage to secure it appear upon same paper, and at end of note are words, "Witness our hands and seals," and on same line a signature of one maker, followed by word "Seal," and under that a signature of other maker similarly followed, and to left of signatures of makers and directly under words first above quoted appear simply signatures of two other persons and mortgage ends in same form and with same signature as note, except that signatures other than those of makers clearly appear as subscribing witnesses, both note and mortgage are sealed instruments, and action thereon would not be stale until expiration of twenty years after right of action accrued. 21 App. 741, 742 (6-c) (95 S. E. 19).

Sheriff's bond: Suit for breach of sher-

Periods of limitation.

iff's official bond, if brought within twenty years from breach, is not barred, though action against sheriff alone not on the bond, might be barred. 143/497, 498 (3) (85 S. E. 742); 144/471, 472 (2) (87 S. E. 390).

§ 4360. (§ 3766.) **Statutory rights.**

Cited. 143/497, 506 (85 S. E. 742).

Divorce: While lapse of time between occurrence of ground for divorce and application therefor may be considered by jury, and, if not satisfactorily explained, may be good ground for refusing divorce, yet statute of limitations does not apply to bar such action. 149/693 (1) (101 S. E. 806).

Freight charges: Since no limitation of time for bringing of actions by carriers for collection of freight charges in interstate shipments is prescribed by act of Congress, statute of limitations of particular State must govern and control in such cases; and since liability of shipper or consignee

Action on sheriff's bond under seal instituted within twenty years from alleged breach thereof not barred by statute of limitations. 23 App. 56 (2) (97 S. E. 457).

for such charges arises by virtue of an expressed or implied promise to pay, and not merely by operation of law, this section is not applicable. 22 App. 595 (1) (96 S. E. 710).

Mileage books: Railroad company's claim for price of mileage books bought on account was not statutory liability. 17 App. 349 (1) (86 S. E. 939).

Stockholder: Action to enforce statutory liability of stockholder of insolvent corporation may be brought at any time within twenty years after right of action accrues. 148/663 (5) (98 S. E. 86).

§ 4361. (§ 3767.) **Simple contracts.**

Bill of lading: Action for damages for breach of contract made by bill of lading is barred in four years. 264 Fed. 355 (3).

Bill of lading issued by common carrier is a contract in writing, within meaning of this section, and is binding upon carrier and shipper, and also upon consignee, or the order-notify consignee, where he purchases the bill of lading, makes no objection to its provisions, presents it to carrier, and obtains possession of goods shipped; provisions of section 4362 do not apply and he is bound by written contract as evidenced by bill of lading, although not signed by him. 19 App. 100 (90 S. E. 1041).

While bill of lading issued by common carrier is a contract in writing within meaning of this section, and as such is binding upon both carrier and shipper, and upon consignee as well, when latter ratifies its provisions by taking possession of goods shipped, still, where action by carrier against consignee for freight, storage, and de-

murrage is shown to have been commenced more than four years after refusal of shipment by consignee, suit is barred under provisions of section 4362. 22 App. 595 (2) (96 S. E. 710).

Freight charges: Suit by common carrier against order-notify consignee, to recover undercharge of freight due on interstate shipment, contract sued upon being evidenced by bill of lading issued by initial carrier, signed by shipper, and purchased by defendant, who made no objection to it, and who secured goods shipped by presenting bill of lading to terminal carrier, is not barred because not brought within four years from accrual of right of action. 19 App. 100 (90 S. E. 1041).

Series of notes: Where each of a series of notes maturing at successive monthly intervals provides that if any two of said notes become due and remain unpaid at any one time, then the remaining unpaid notes shall be considered as due, the default in payment of two notes, which had ma-

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tured did not entitle holder to bring suit on notes not yet matured, and which had been transferred without indorsement. 140/274 (78 S. E. 1003).

§ 4362. (§ 3768.) **Open accounts.**

Cited. 143/497, 506 (85 S. E. 742). Stated. 145/601 (1) (89 S. E. 680).

Bank: Statute of limitations would begin to run against certificate of deposit made returnable "to order of administrator, 12 months after date, on return of certificate, properly endorsed, with interest at the rate of six per cent per annum. Interest will cease at maturity," only from date it was returned to bank properly endorsed and payment thereof was actually demanded and refused. 145/508 (2) (89 S. E. 516).

Bankruptcy: This section does not apply to action by trustee in bankruptcy against transferee for value of goods received from bankrupt in payment of preexisting debt less than four months prior to filing of petition in bankruptcy. 140/585 (1) (79 S. E. 470).

Bill of lading: Action for damages for breach of contract made by bill of lading is barred in four years. 264 Fed. 355 (3).

Bill of lading issued by common carrier is contract in writing within meaning of section 4361, and is binding upon carrier and shipper, and also upon consignee, or order-notify consignee, where he purchases bill of lading, makes no objection to its provisions, presents it to carrier, and obtains possession of goods shipped; provisions of this section do not apply and he is bound by written contract as evidenced by bill of lading, although not signed by him. 19 App. 100 (90 S. E. 1041).

While bill of lading issued by common carrier is a contract in writing within meaning of section 4361, and as such is binding upon both carrier and shipper, and upon consignee as well, when latter ratifies its provisions by taking possession of goods shipped, still, where action by carrier against consignee for freight, storage, and demurrage is shown to have been commenced more than four years after

Warranty: Action for breach of implied warrant in simple written contract is governed by this section. 145/761 (3) (89 S. E. 1075).

refusal of shipment by consignee, suit is barred by this section. 22 App. 595 (2) (96 S. E. 710).

Federal court: Under this section and section 4381, suit in State court, without dismissal, might be renewed in Federal court within limitation period. 224 Fed. 810 (4).

Freight charges: Suit by common carrier against order-notify consignee, to recover undercharge of freight due on interstate shipment, contract sued upon being evidenced by bill of lading issued by initial carrier, signed by shipper, and purchased by defendant, who made no objection to it, and who secured goods shipped by presenting bill of lading to terminal carrier, is not barred because not brought within four years from accrual of right of action. 19 App. 100 (90 S. E. 1041).

Last item: Where suit was brought on May 21, 1913, on open account last item of which bore date May 21, 1909, and this appeared on face of pleadings, error to overrule demurrer. 145/601 (4) (89 S. E. 680).

Mileage books: Railway company's action for price of mileage books sold on account was barred by limitations when not brought within four years after accrual of right of action. 17 App. 349 (1) (86 S. E. 939).

Under Rev. St. U. S. § 721 (U. S. Comp. St. 1913, § 1538), statute of limitations of particular State where action is brought controls in respect to right of action for price of mileage books for both intrastate and interstate transportation. Id. 349 (2).

Petition in action for price of mileage books sold during several successive years was barred by limitations where last book was sold April 13, 1910, and suit was brought in 1914. Id. 349 (3).

Will: Question as to statute of limitations in action against administrator for services rendered by plaintiff to decedent over a period of 35 years

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was met by charge of court, which limited recovery to four years next preceding death of decedent, and by the verdict, which was "for \$400 per year for four years or for \$1,600." 18 App. 730, 731 (2) (90 S. E. 488).

Cause of action based upon breach

§ 4363. (§ 3769.) Mutual accounts.

Cited. 22 App. 79, 81 (95 S. E. 375).

Course of dealing: A mutual account such as will prevent limitation from running is one based on a course of dealing where each party has given credit to the other on the faith of the indebtedness. 13 App. 793, 795 (80 S. E. 42).

Jury: Whether or not an account is a mutual one is a question of fact. 13 App. 793 (2) (80 S. E. 42).

Mutual account: Statute of limitations does not apply to suit on mutual account. 18 App. 601 (89 S. E. 1091).

Where claim as originally made did not entirely fail to set forth cause of action, but, in absence of additional averments, plaintiff's remedy was merely unavailable when properly objected to it was not improper to allow details and circumstances of particular transactions to be amplified or varied by amendment, so as to show mutuality of account such as would prevent bar of limitations from attaching, especially where bill of particulars might reasonably indicate that such was original design of pleader. 23 App. 644 (3) (99 S. E. 228).

Where almost all of claim entered for items owing on account was subject to demurrer on ground that such

of contract, made by decedent, to compensate plaintiff, by a legacy in her will, for services rendered to her in her lifetime, arose at the death of decedent. 21 App. 820 (1) (95 S. E. 313).

items appeared to be barred under statute of limitations, such defect was cured by amendment setting up such claim under separate and distinct count, wherein additional facts were alleged, showing that account was mutual one, being based upon course of mutual dealings between the parties, wherein each had extended credit to the other on faith of indebtedness owing on both sides. 23 App. 644 (3) (99 S. E. 228).

Even if under original petition specified dates of different items would have to give way to statements as made in different portions of petition, still judge might allow amendment striking one of such statements, so that its only remaining effect would be that such stricken statement could be taken and considered by jury along with other evidence in case as admission made under original pleadings. 23 App. 644, 645 (4) (99 S. E. 228).

Petition in action on account held here to present such a case of mutual dealings as would relieve from the bar of limitations, where it stated that there was a mutual extension of credit. 13 App. 793 (1) (80 S. E. 42).

§ 4365. (§ 3771.) Certiorari.

Bond and security and certificate as to payment of costs, which are prerequisite to issuance of writ of certiorari, where no pauper's affidavit is supplied in lieu thereof, may be executed or obtained at any time within three months from date of judgment complained of, and before duly sanctioned petition for certiorari is presented to clerk of superior court in order that writ or certiorari may issue thereon. 21 App. 389 (2) (94 S. E. 606).

Compute time: Where judgment was rendered on March 18th, petition for certiorari filed on June 18th was not in time. 142/659 (83 S. E. 519).

Filing: Application for writ of certiorari was filed in time where judgment complained of was dated November 19th, and writ was sanctioned November 29th, and filed January 2nd with clerk of superior court. 143/572 (1) (85 S. E. 760).

Where one obtains sanction of petition for certiorari within time fixed

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by law, he may present petition for filing to clerk of superior court at any time within three months from date of judgment complained of; when petition is so filed more than 20 days before next term of that court, writ should be made returnable to that term; but plaintiff in certiorari is not required to present petition for filing within less than three months

from date of judgment, merely because term of superior court would otherwise intervene between time when petition is sanctioned and term to which writ is of necessity made returnable by clerk, because filed too late for term next succeeding the sanction. 21 App. 389 (1) (94 S. E. 606).

§ 4366. (§ 3772.) **Suits against executors, administrators, etc.**

Applied. 147/494 (2) (94 S. E. 766).
Cited. 143/497, 506 (85 S. E. 742).

Constructive trusts: Where husband who invested wife's separate estate recognized it as trust for her so long as she lived, and after her death for use of her heirs at law so long as he lived, limitations as against demand for accounting would not be applicable, but where husband's administrator attempted to administer all property left by his intestate, limitations would begin to run in favor of the administrator, and suit for accounting commenced against administrator more than ten years thereafter would be barred. 147/235 (2) (93 S. E. 411).

Incorporeal interest: Covenant to open and construct public street and sidewalks in manner beneficial to covenantee, amounted to agreement to confer upon covenantee incorporeal interest in the land; and where based upon adequate consideration, certain and fair and capable of being performed, specific performance will be decreed. 145/594 (2) (89 S. E. 693).

Opening street: Allegations of petition here to compel opening and construction of public street and sidewalks through lands of covenantors, sufficiently alleged consent of city to establishment of street. 145/594 (2-a) (89 S. E. 693).

Parties: Where non-resident corporation accepted, for another corporation, which had really purchased

land without having taken deed in its own name, deed reciting covenant, and both corporations execute another deed in which the real purchaser and the last grantee assume the covenant, specific performance will be compelled against the last two corporations. 145/594 (1) (89 S. E. 693).

Repudiation: Action to set aside purchase of land by administrator at his own sale was barred by laches as to person sui juris when not brought for more than 7 years after the sale and the time when such persons become of age. 141/387 (81 S. E. 129).

Such action was not barred by laches as to a person who became of age within less than 7 years before commencement of the action, though brought more than 7 years after sale. Id.

Time: Equitable action brought in 1917 upon administrator's bond, against sureties alone, in which petition alleged that married woman died intestate, leaving her husband as sole heir at law, that in 1885 administrator was appointed, who gave bond with two sureties, that in 1887 administrator sold certain land, proceeds from which were never reported or paid over to the heir, that the administrator died and there was no administration upon his estate, that the administrator came into possession of such money, was barred by limitations. 148/307 (96 S. E. 568).

§ 4368. (§ 3774.) **Other actions ex contractu.**

Bankruptcy: This section does not apply to action by trustee in bankruptcy against transferee for value of goods received from bankrupt in payment

of preexisting debt less than four months prior to filing of petition in bankruptcy. 140/585 (1) (79 S. E. 470).

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Bill of lading: Action for damages for breach of contract made by bill of lading is barred in four years. 264 Fed. 355 (3).

Fiduciary funds: Where attorney in fact appointed by executrix in collusion with bank in which decedent had deposited moneys, fraudulently withdrew such funds and paid them out either to bank or upon his own debts, claim of estate against attorney and bank is subject to application of statute of limitations, and

will be barred after four years. 145/376 (1) (89 S. E. 337).

Mileage books: Railway company's action for price of mileage books sold on account was barred by limitations when not brought within four years after accrual of right of action. 17 App. 349 (1) (86 S. E. 939).

Petition in action for price of mileage books sold during several successive years was barred by limitations where last book was sold April 13, 1910, and suit was brought in 1914. Id. 349 (3).

§ 4369. (§ 3775.) **Limitations in equity.**

Knowledge: It appearing that a deed was recorded in 1896, the same year that it was executed, by the administrator of deceased grantor, who was then clerk of the superior court, and that one of the grantors' heirs was a witness to it, there was not such lack of knowledge on the part of the grantor's heirs as to save an action brought in 1910 to cancel such deed from being too late. 140/739 (2) (79 S. E. 782).

Legal actions: Equitable doctrine as to stale demands has no application where action is legal one and period fixed by statute of limitations for assertion of claim has not expired. 20 App. 309 (2) (93 S. E. 70).

Mental incapacity: Suit brought in 1910 by heirs of grantor who died in April of 1897, to set aside deed executed in January 1896, on ground of lack of mental capacity, properly dismissed for laches. 140/739 (1) (79 S. E. 782).

Mortgage: Plaintiff was not estopped from enforcing mortgage *fi. fa.* on account of laches and lapse of time, where he did not seek any affirmative equitable relief and *fi. fa.* was not barred by limitations. 144/100 (4) (86 S. E. 241).

Second mortgagees of the Selma, Rome & Dalton Railroad Company are estopped from foreclosing their mortgage in equity, because by the lapse of time and their laches it would be inequitable to allow them to enforce the legal rights claimed by them. 149/434, 435 (100 S. E. 380).

Partnership: Surviving partner here in action by heirs and legatees of deceased partner for accounting was not deprived of right to extra compensation for services because of statute of limitation. 147/178, 179 (2-b) (93 S. E. 289).

Specific performance: Action for specific performance commenced January 3, 1913, was not barred by laches, covenantors having refused performance subsequent to February 1, 1908, in absence of showing that on account of lapse of time it would be inequitable to allow plaintiff to enforce his rights. 145/594 (3) (89 S. E. 693).

Where, in suit for specific performance against administrator of decedent, date of death of decedent was not alleged, it can not be held on demurrer that plaintiff was barred by laches. 147/50, 52 (6) (92 S. E. 872).

§ 4370. (§ 3776.) **Suits by informers.**

Railroad company: Statute of limitations applicable to suit under section 2755 to recover penalty for failure to sell tickets of connecting road at

rate fixed by railroad commission is that provided by this section. 142/94 (1) (82 S. E. 499).

Exceptions and disabilities.

§ 4373. (§ 3778.) **Suits to recover trust property sold without proper authority, when brought.**

Bankruptcy act of 1898, conferring on trustees in bankruptcy right to institute certain actions, fixed a statute

of limitations applicable to such cases. 140/585 (2) (79 S. E. 470).

General Note on Limitations.

Amendment: Where in an action by railroad employee for personal injuries plaintiff was permitted to amend his petition to state that defendant such amendment related back to the institution of the suit. 141/350 (3) (80 S. E. 997).

Disallowance of amendment setting up plea that plaintiff's action was barred by limitations was error, where such plea was not dilatory. 17 App. 665 (2) (87 S. E. 1096).

Bankruptcy: Where cause of action was barred when bankruptcy was adjudicated, the trustee in bankruptcy, relatively to interposition of the bar of the statute of limitations, stands in no better shoes than the bankrupt, and suit by him is barred. 149/701 (2) (101 S. E. 803, 44 A. B. Rep. 617).

Extinguishment of debt: A debt, although action to recover it may be barred by statute of limitations, is not extinguished. 145/810 (1) (89 S. E. 1083).

Homestead: Statute of limitations did not run against *fi. fa.* during life of homestead. 144/100 (3) (86 S. E. 241).

Pleadings: Where demands sought to be asserted did not expressly appear

to be barred, pleadings must be construed most strongly against pleader. 140/71 (78 S. E. 423).

Plea that debt is barred by limitations is personal plea, and can not be taken advantage of by third person. 15 App. 249 (3) (82 S. E. 941).

Where pleadings on their face show that suit is barred by statute of limitations, defendant can take advantage of statute by demurrer; but demurrer must expressly set out reliance on the statute; its aid cannot be invoked by general demurrer that no cause of action is set out or that none is stated which can be enforced against defendant. 146/59 (1) (90 S. E. 474).

General demurrer on ground that it affirmatively appears from allegations in petition that plaintiff can not legally enforce her claim for damages against defendant is insufficient to raise defense that action is barred by limitations. 146/59 (2) (90 S. E. 474).

Remedies: The limitation laws (except certain provisions of the special act of 1869) act only upon remedies and do not extinguish rights. 23 App. 644, 645 (4) (99 S. E. 228).

SECTION 2.

Exceptions and Disabilities.

§ 4374. (§ 3779.) **Persons excepted.**

Divorce: Where suit for divorce was brought within one month after statute of limitations had run, testimony that defendant was paroled from asylum in custody of brother on condition that he should not be allowed to go to home where his wife was living for 90 days, which had not expired when suit was

brought, was relevant. 145/541 (1) (89 S. E. 517).

Imprisoned person: Criminal act of maker of note, followed by his legal imprisonment, did not postpone payee's right to commence and prosecute his suit upon the note; plaintiff was unfettered and could have sued, and proper venue for suit remained in

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county of defendant's residence at time of arrest and conviction. 19 App. 549 (1) (91 S. E. 918).

Informer's action: This section has no application to suit by informer to recover penalties; and the statute of limitations applicable to actions of that character is not suspended so as to allow infant the same time, after becoming of age, to bring such a suit as is prescribed for other persons, before bar of the statute will attach. 142/94 (2) (82 S. E. 499).

Insane person, who is such when cause of action accrues, shall be entitled to same time to bring action after disability is removed as is prescribed for

other persons, who are under disability. 149/548 (3) (101 S. E. 124).

Minority: Petition here by guardian in behalf of minor wards, alleged to be heirs at law, to set aside appointment of administrator and to revoke his letters was not barred by limitation. 145/405, 406, (3) (89 S. E. 364).

Where remaindermen under trust deed, except plaintiffs in error, attained their majority more than seven years prior to filing of suit against purchaser at alleged unauthorized sale by trustee, only plaintiffs in error brought action in time. 147/5, 6 (5) (92 S. E. 514).

§ 4375. (§ 3780.) **Disabilities occurring after accrual of right.**

Infant: Action here by minor remainderman to reform deed and recover land was not barred by statute of

limitations. 149/151 (1) (99 S. E. 376).

§ 4377. (§ 3782.) **Creditors of unrepresented estates.**

Partnership: Suit brought in 1913 by administrator of deceased partner against executor of other partner for half interest in land and mesne profits was not barred, where firm took possession in 1883 and remained joint owners until one died in 1899, after which other kept possession, promising until his death in 1910 that

he would settle with deceased partner's heirs. 143/486 (85 S. E. 703).

Action for equitable accounting as to lands of which partners, since deceased, were joint owners, and for recovery of interest in partnership personality, was barred after nine years. Id.

§ 4378. (§ 3783.) **Absence from State of defendant.**

Allegation of amendment to petition that account was not barred since defendant had not resided in any State for four years at any one time

was not sufficient to toll statute of limitations. 143/130 (2) (84 S. E. 554).

§ 4380. (§ 3785.) **Fraud.**

Actual fraud: In order to prevent limitation in receipt issued by express company relative to period for bringing action for loss, etc., from attaching where suit is not brought within period designated, such actual fraud on part of company must be shown as would relieve shipper from compliance from such requirement; mere fact that company neither paid nor declined payment of claim, when properly made, within such period of limitation, would not of itself suffice

to do so. 20 App. 467 (2) (93 S. E. 109).

Diligence: No facts being alleged showing fraud preventing discovery of plaintiff's rights by use of slightest diligence, not error to dismiss petition. 140/71 (78 S. E. 423).

One whose action is founded on actual fraud must use reasonable diligence to discover it, and limitations will be tolled only where such diligence is used. 144/26 (2) (85 S. E. 1028).

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Allegations of diligence in petition here in action for fraudulent misrepresentations in sale were insufficient to excuse nearly six years' delay. *Id.*

Case was not taken out of statute of limitations by allegation of petition, filed in May, 1916, by which he sought to recover amount alleged to be due him as balance from proceeds of land sales which in April, 1907, defendants, acting under written contract between himself and defendant corporation, made as his agents, and as to which, it was alleged, he discovered in June 1913, that they had deceived him by misrepresentations as to price and sums received as payments. 20 App. 317 (1) (93 S. E. 36).

§ 4381. (§ 3786.) Nonsuit or dismissal.

Cited. 17 App. 674, 675 (88 S. E. 36).
Stated. 17 App. 4 (1) (86 S. E. 277).

Abatement: Legal result of sustaining plea in abatement is dismissal within this section. 17 App. 637 (1) (87 S. E. 912).

Affirmance on appeal: That plaintiff had formerly brought suit for same cause of action and had been nonsuited, which judgment of nonsuit was affirmed upon appeal to Court of Appeals, does not prevent bringing of suit again within six months from date of such affirmance. 140/309, 310 (2) (78 S. E. 931).

Appeal: Where bill of exceptions is not tendered to judge until after time prescribed for tendering it for certification, he is without jurisdiction to certify to it, and bill dismissed by reviewing court because not tendered in prescribed time is to be treated as void ab initio; in such case judge's certificate could not operate to arrest running of time in which, under this section, action may be renewed after nonsuit or dismissal. 22 App. 166 (1) (95 S. E. 470).

Where Supreme Court dismissed, on ground that it was not tendered in prescribed time, bill of exceptions seeking to review judgment of nonsuit as to action renewed in case again taken up, that bill of exceptions did not arrest operation of statute of

Divorce: Where plaintiff in divorce suit fraudulently failed to comply with sections 5556, 5557, his conduct was such fraud as to toll the statute of limitations under provisions of this section, and defendant is entitled, on petition filed within statutory period, to vacation of judgment. 145/481 (2) (89 S. E. 574).

Promoters of corporation fraudulently inducing subscribers to take stock did not stand in such fiduciary relation as to suspend running of limitations against suit by stockholder. 144/26 (3) (85 S. E. 1028).

Time: Statute, in action for damages from fraud, begins to run from time damage occurs. 144/519 (1) (87 S. E. 661).

limitations, and where it appeared from plaintiff's petition that second suit was brought more than six months after judgment of nonsuit was rendered, and more than two years after personal injury for which plaintiff was suing, court erred in overruling defendant's demurrer, in which statute of limitations was set up. 22 App. 166 (2) (95 S. E. 740).

Certiorari: If original application for writ be for any reason void, attempt to renew it within six months must be held to be ineffectual. 14 App. 690, 691 (82 S. E. 154).

Petition for certiorari is within this section, and may be renewed within six months after dismissal. 15 App. 243 (1) (82 S. E. 932).

Premature dismissal of petition for certiorari is not ground for reversal, where petition which was in renewal of dismissed petition, was filed more than six months after dismissal of former petition. 17 App. 4 (2) (86 S. E. 277); 18 App. 525 (1) (89 S. E. 1102).

A first certiorari dismissed for want of notice of sanction was void ab initio, and petitioners were not entitled to renew it, and there was no error in dismissing second certiorari before return term. 18 App. 525 (2) (89 S. E. 1102).

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Codification: Considering original act and codification thereof, legal inference can not be drawn that General Assembly intended to change law, so as to deprive a plaintiff of right of renewal when dismissal results from adverse ruling of court. 17 App. 637, 638 (1-d)) (87 S. E. 912).

Construed liberally: This section is remedial, and is to be given a liberal construction. 20 App. 21 (1) (92 S. E. 405).

Copy: If point be raised by timely special demurrer, plaintiff who relies on privilege of renewal under this section may be required to attach to his petition copy of petition in first suit, so that court may determine, as a matter of law, whether the two suits were for same cause of action and between same parties, and whether first suit was brought before bar had attached, and in a court having jurisdiction of the subject-matter. 20 App. 101 (1) (92 S. E. 544).

Death: Where plaintiff dies and personal representative is made party, and case is nonsuited, personal representative may recommence suit within statutory period. 17 App. 756 (1) (88 S. E. 413).

Dismissal: Where suit is voluntarily dismissed without service, and it appears that plaintiff, within six months thereafter, brought second suit, first action did not constitute pendency of suit so as to preclude running of limitations. 144/613 (2) (87 S. E. 1068).

Case renewed within six months after dismissal stands on same footing with original case, whether dismissal be voluntary, or involuntary under operation of adverse ruling. 17 App. 637 (1-a) (87 S. E. 912).

That plaintiff, within two years after accrual of right of action for death of her husband, sued in United States court, and voluntarily dismissed suit more than two years after accrual, and then within six months sued in city court, did not avoid bar of limitations. 17 App. 638 (1) (87 S. E. 908).

Federal court: Under this section and section 4362, suit in State court, after dismissal, might be renewed in

Federal court within limitation period. 224 Fed. 810 (4).

Where resident of another State within four years after defendant's repudiation of parol contract for sale of land sued in State court and voluntarily dismissed suit, having previously begun suit in Federal court, though more than four years elapsed between repudiation and last suit, it is continuation of suit in State court tolling limitations. 246 Fed. 236, 237 (4); s. c. 158 C. C. A. 396.

Where resident of foreign State filed in State court of Georgia bill seeking specific performance of contract to convey Georgia lands and then dismissed suit, having previously filed suit for similar relief in Federal court, such suit filed in Federal court must be deemed renewal of original suit, and will toll limitations. 246 Fed. 236, 237 (5); s. c. 158 C. C. A. 396.

Jurisdiction: Where suit brought within time prescribed by statute of limitations, in court having jurisdiction of subject matter, is dismissed solely for want of jurisdiction of the person, it may be renewed within six months under this section, which should be construed liberally so as to allow renewal where suit is disposed of on any ground not affecting its merits. 148/90 (95 S. E. 994); 20 App. 668 (1) 93 S. E. 309).

Where suit against railroad company for injuries caused while both plaintiff and defendant were engaged in interstate commerce was brought within two years from date of injuries, and was dismissed because court had no jurisdiction over defendant, and within six months after dismissal action was renewed in court having jurisdiction, and by amendment all reference to interstate commerce was stricken, so that suit for damages incurred while plaintiff was engaged in intrastate commerce alone remained, court erred in sustaining demurrer on ground that action was barred by Federal statute requiring such suit to be brought within two years. 20 App. 668 (2) (93 S. E. 309).

Parties: Institution of action against different defendant on same cause of

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action as that involved in suit dismissed was not renewal of action within this section. 16 App. 43 (4) (84 S. E. 494).

Where suit against estate having more than one representative is abated for nonjoinder of one or more representatives, and within six months thereafter is renewed with all representatives joined as defendants, second suit stands as to limitations as did first suit. 17 App. 637, 638 (2) (87 S. E. 912).

Second suit by plaintiff's personal representative after nonsuit must be for same cause of action, but need not be against all former defendants, unless they are necessary parties. 17 App. 756 (2) (88 S. E. 413).

Pleading: Allegations here as to former suit on same cause of action, brought within period of limitations, and dismissed, and as to its renewal and the

right of renewal, were not sufficient to show that case came within this section. 19 App. 94 (90 S. E. 1040).

Service: Where person was sued in county other than that of legal residence or domicile and sheriff's entry of service stated that defendant was served by leaving copy "at his place of residence," and defendant appeared and filed plea to jurisdiction on ground of residence in another county and named sheriff party to traverse of entry of service, and verdict sustained traverse and another verdict sustained plea to jurisdiction, judgment dismissing case for want of jurisdiction, suit was such as prevented statute of limitations from running as against subsequent suit brought for same cause of action within six months in county of true residence. 24 App. 621 (102 S. E. 37).

SECTION 3.

New Promise.

§ 4383. (§ 3788.) New promise must be in writing.

Certainty: In order for new promise to pay to avail, it must be for sum which is itself definite, or one capable of being reduced to certainty, and can not be dependent on subsequent agreement of parties or finding of jury upon such an issue. 22 App. 168 (95 S. E. 721).

Conditional promise: Where new promise, accompanied by a condition, is relied upon as fixing subsequent date from which period of limitation or right of action shall commence to run, promise becomes effectual only upon acceptance and compliance with condition accompanying it. 22 App. 168 (95 S. E. 721).

Where plaintiff never accepted offer as contained in letters of defendant, but declined to comply with condition thereby imposed, it could not rely upon proposal as absolute promise to pay; nor could general admission

of indebtedness, unsettled in amount, be relied upon as constituting new promise to pay particular demand. 22 App. 168 (95 S. E. 721).

Devise: Parol agreement to devise described land, on consideration of certain sum of money and value of certain services which promisee had rendered promisor, is enforceable at death of promisor by equitable remedy of specific performance. 147/145 (2) (93 S. E. 296).

Fact that services were rendered in pursuance of another agreement which may have been too indefinite for enforcement, and had been rendered more than four years before making of last contract, would not render applicable provisions of this section. 147/145 (2-a) (93 S. E. 296).

Note: Recovery may be had on note apparently barred by limitations, on proof of such written acknowledgment of debt as will support infer-

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ence of new promise. 14 App. 306 (2) (80 S. E. 726).

Acknowledgment sufficient to prevent recovery may be established by contents of letter which does not identify note by specific reference to its date. *Id.*

Extrinsic evidence is admissible to aid identification of note barred by limitations, as one referred to in writing acknowledging debt. *Id.*

Writing: Where in action on alleged ac-

count stated, which was apparently barred by statute of limitations, plaintiff, in effort to avoid the bar, averred that original liability was revived by a new promise to pay, and all the testimony introduced showed conclusively that the "new promise" was not in writing, verdict in favor of defendant's plea that the account was barred was demanded. 22 App. 695 (97 S. E. 105).

§ 4384. Discharge in bankruptcy; new promise.

Discharge: Promise by debtor to pay previously existing debt to his creditor, made after former's adjudication as a bankrupt, but before his discharge, will not be impaired by the subsequently acquired discharge, as the discharge relates back to the adjudication in bankruptcy, and the effect of such a promise to pay a debt provable in bankruptcy is to renew the obligation. 20 App. 96 (1) (92 S. E. 547, 39 A. B. Rep. 631).

Provisions of this section must be construed to include such a promise to renew made subsequent to adjudication in bankruptcy but before formal discharge, for same reason that discharge of bankrupt relates back to adjudication in bankruptcy. 20 App.

96 (2) (92 S. E. 547, 39 A. B. Rep. 631).

Executory contract of employment of agent, which contains stipulation that part of his commissions on sales shall be applied in payment of pre-existing debt due to principal, does not remain in effect after agent's discharge in bankruptcy from such previous indebtedness, so that its continued compliance could be thereafter enforced; but so long as parties, by subsequent acquiescence in its terms and performance of its conditions, elect to treat the contract as still subsisting, they are bound by its provisions. 21 App. 87 (1) (94 S. E. 56, 40 A. B. Rep. 453).

§ 4386. (§ 3790.) Effect of new promise.

Account stated: Where in action on alleged account stated, which was apparently barred by statute of limitations, plaintiff, in effort to avoid the bar, averred that original liability was revived by a new promise to pay, and all the testimony introduced

showed conclusively that the "new promise" was not in writing, as required by section 4383, verdict in favor of defendant's plea that the account was barred was demanded. 22 App. 695 (97 S. E. 105).

§ 4387. (§ 3791.) New promise by partner.

Note: Salesman who is told by former member of partnership that he is no longer a member of the firm, and who goes to the other member of the firm and receives order for goods signed in the firm's name, must report to his firm, the information received concerning the dissolution, and his fail-

ure to do so would not prevent the member of the firm who had retired from successfully pleading "no partnership," especially when sued upon note given after dissolution, in renewal of the account. 21 App. 576, 579 (94 S. E. 820).

Of breach and damage.

CHAPTER 8.

Of Breach and Damage.

§ 4389. (§ 3793.) Suits for breach of contracts.

Cited. 13 App. 253, 254 (3) (79 S. E. 496).

Stated and applied. 16 App. 646 (85 S. E. 942).

Admissions: Defendant in action for breach of warranty of automobile having admitted execution of contract, this was an admission of doing of acts necessary to carry its purpose into effect and left plaintiff with necessity of proving merely a breach and damages. 13 App. 632 (79 S. E. 750).

Architects: Refusal of court in action by architect for services in preparing plans and specifications to charge that if building cost certain sum according to plans and specifications prepared, it would not be compliance on architect's part with his contract, and he would not be entitled to recover, was not error, as question whether such sum was not approximately within agreed cost of building was distinctly matter for jury to determine. 21 App. 488, 492 (6) (94 S. E. 593).

Where architect contracts to furnish plans and specifications, together with estimates of cost, for erection of building, and one sum is to be paid for entire service, there is an entire contract; and if, after furnishing plans and specifications, he should, without fault of other party, fail or refuse to furnish estimate, there would be a breach of contract and he could not recover for such part performance. 23 App. 236 (1) (98 S. E. 188).

Automobile dealer: Contract attached to petition for its breach wherein automobile manufacturer granted plaintiff privilege of selling at price fixed by contract as many as 50 cars, he to pay price and draft attached to bill of lading for each car shipped, and which, as modified by letters, did not require order of number of cars specified in schedule attached to contract and entitled plaintiff to shipment of cars as ordered, was not con-

tract of bargain and sale, but dealer's contract, and dealer could recover only difference between contract price and price at which he was to sell cars for which his orders were accepted. 24 App. 633 (2) (101 S. E. 693).

Bond: Petition alleging breach of stipulation of bond that house was to be delivered free from liens, and with all bills for labor and material fully paid, and setting out bills left unpaid, and alleging that liens had been filed and that foreclosure proceedings were threatened, and, by amendment, alleging that judgment had been obtained by reason of said unsatisfied liens, was not subject to special demurrer on ground that it showed upon its face that there had been no recovery against plaintiff on account of unpaid bills and that he could not file suit for breach of bond until claims of lien had been adjudicated against his property. 20 App. 497 (3) (93 S. E. 112).

Coal: Nonsuit was proper in action for breach of contract to deliver coal, which was made subject to strikes, accidents, car supply, or other causes beyond control, where it was shown that the available supply of coal was exhausted by reason of floods, or the coal company was unable to supply coal as ordered, or upon the date ordered, by reason of inability to ship on account of shortage of cars, or other conditions provided for by the contract. 22 App. 597 (96 S. E. 708).

Continuing contract: Absolute refusal by one party to perform executory contract containing mutual obligations, prior to date fixed for performance, if such repudiation goes to whole contract, amounts to tender of breach of contract, and if accepted as such by opposite party, it constitutes anticipatory breach, and injured party may at his election at once sue and recover his entire damages, opposite party not required to accept

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tender of breach, but may elect to keep contract in force in which case obligations of both parties will continue until time for performance. 20 App. 660 (1) (93 S. E. 532).

Where tender of anticipatory breach of contract has been accepted and suit at once commenced, injured party may recover entire value of his contract, as if breach continued to date fixed for performance; generally his measure of damages, as under contract of sale and purchase, is difference between contract price and market price on date fixed for performance. 20 App. 660, 661 (2) (93 S. E. 532).

Though plaintiff sues at once for anticipatory breach of contract, and trial is had before expiration of contract, measure of damages is difference between contract price of subject matter of contract and market price at time and place of performance, and not at time of breach; this is true although subject matter is an article usually and generally, but not exclusively, sold for future or forward delivery. 20 App. 660, 661 (4) (93 S. E. 532).

Where subject matter of contract has no current value, measure of damages for anticipatory breach is generally difference between contract price and cost of production at time for performance, whether trial of action is before or after time fixed for delivery, but cost of production is material only where article has no market or current value, and evidence concerning cost of production is entirely irrelevant where subject matter of contract is sold generally throughout the United States, continental Europe, and Japan. 20 App. 660, 661 (5) (93 S. E. 532).

Date when alleged breach of contract by plaintiff occurred was material fact, where defendants admitted that they had received from plaintiff, under contract, amount of goods stated in petition; and had date been alleged, plaintiff might have shown that at that time defendants had already breached the contract by failure to pay for goods delivered, and in such event defendants could

not recover damages for subsequent failure by plaintiff to comply with contract. 23 App. 641 (2) (99 S. E. 225).

Elect: Where, after breach of contract, opposite party not only retains articles received but puts them to his own use, there is an election to abide by the terms of the original contract and such opposite party thereafter holds under those terms the articles actually received. 23 App. 236 (1) (98 S. E. 188).

Employment: Declaration alleging that plaintiff and defendant entered into written contract of employment for one year at salary payable weekly, that plaintiff was wrongfully discharged, that he was ready, able and willing to perform the services, but defendant wrongfully breached the contract, and which prayed for damages for part of the term of employment, but not subject to plea in abatement or bar which alleged judgment in prior suit for breach of same contract, etc., where it appeared that former suit was for only part of salary which would have been earned for designated period, salary for time covered by first suit being expressly excluded in second suit. 20 App. 404 (2) (93 S. E. 324).

Evidence: That one plaintiff stated in his deposition that contract sued on was dated September 11th, did not require that such contract dated September 8th be excluded. 16 App. 149 (3) (84 S. E. 597).

Deeds here to intestate conveying timber lands were within pleadings in action against administrator personally and heirs alleging contract to sell turpentine rights in timber lands owned by defendants derived from intestate. 145/616, 617 (4) (89 S. E. 689).

Testimony, in action for breach of contract by F. C. M., administrator of the estate of E. P. M., that when contract was signed an heir of E. P. M., who was one of the defendants, was present and approved the contract was inadmissible. 145/616, 617 (5) (89 S. E. 689).

Evidence here in action for damages on account of alleged breach of

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contract for option to purchase certain land was not sufficient to support verdict for plaintiff. 20 App. 606 (93 S. E. 165).

Installments: Where purchaser's obligation was that after removal of mortgage by vendor she would execute notes for \$1500, "payable at the rate of \$25 per month, beginning with the month of October, 1905," and the mortgage was not removed until December 1905, the purchaser was liable for \$1500, with the interest at 7 per cent on \$25 from January 1, 1906, and on \$25 from the first day of each of the next 59 succeeding months. 141/438, 439 (2) (81 S. E. 201).

One who claims breach of contract of employment for a year, and alleges wrongful discharge 4 1-2 months before conclusion of term, and after the year brings an action for the half of the salary for the month for which he was paid half, is estopped to sue for the salary for the succeeding 4 months. 13 App. 253, 254 (4) (79 S. E. 496).

Where contract is made by reputed father of child with the mother to pay her a certain sum per month until the expiration of ten years, for the support of the child, the mother may sue the father monthly, or she can wait until the expiration of the ten years and sue him for the entire amount. 13 App. 469 (3) (79 S. E. 366).

Interest: Contract under which loan was made here did not confine lender to right to sue for past-due installments, but authorized it to sue for full amount of loan, with interest thereon, on debtor's failure to pay three past-due installments. 143/530 (4) (85 S. E. 749).

Landlord: Where owner of realty violates written agreement to execute lease, though having ability to fulfill same, he is chargeable with full damages therefor. 14 App. 158 (1) (80 S. E. 668).

Measure of damages is difference between rent agreed to be paid and actual value of use of premises. *Id.*

In action for damages for breach of contract to give note, with deed

to secure it for money loaned, in absence of special fact authorizing equitable relief, plaintiff is not entitled to special lien on land for damages which he may recover. 145/106 (2) (88 S. E. 569).

Where landlord wrongfully refuses to perform his part of contract with cropper, and cropper elects to sue immediately, and term of contract expires before trial is had, recovery may, under proper averments, embrace all damages down to expiration of term. 22 App. 284 (2) (96 S. E. 16).

Where petition in action by cropper against his landlord for wrongful refusal to perform contract authorizes but one measure of recovery, plaintiff will be restricted to that measure. 22 App. 284 (2) (96 S. E. 16).

Where suit is brought by cropper against landlord for wrongful refusal to perform contract before expiration of harvest season, and value of plaintiff's share of crop is only measure of damages alleged, petition, even if defective, is not subject to general demurrer, sustaining of which would be adjudication of action upon its merits. 22 App. 284 (3) (96 S. E. 16).

Value of cropper's share of crop is measure of damages for wrongful refusal of landlord to perform contract only where trial is after expiration of term of alleged contract. 22 App. 284 (3) (96 S. E. 16).

Law list: Sustaining demurrer and dismissing petition seeking to recover damages for cancellation and breach of contract to advertise and recommend plaintiffs, firm of attorneys at law, as representatives of defendant in its "law list" and directory, was not error where cancellation was authorized by provisions of contract. 22 App. 368 (95 S. E. 1012).

Notes: Measure of recovery for breach of contract to pay note for which plaintiff was liable is the amount of plaintiff's liability thereon. 143/721 (1) (85 S. E. 895).

Allowance of claim as recoupment did not ipso facto pay notes in default so as to prevent action on whole series of notes, in absence of agree-

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ment or demand to that effect. 16 App. 146 (3) (84 S. E. 616).

Pleading: Petition in action for breach of contract should disclose terms of contract, manner of breach, injuries therefrom, and how they were caused thereby. 14 App. 451 (1) (81 S. E. 384).

Where contract sued on was entire contract, defendants could plead that plaintiff had breached it in certain particulars, setting them forth, and it was not incumbent upon them to allege amount that they had been damaged by reason of such breaches. 19 App. 518, 519 (6) (91 S. E. 913).

Railroad: Landowner's measure of damage for railroad company's breach of covenant to provide openings in the superstructure for its track, so as not to injure his land, is difference in value of land before and after breach. 265 Fed. 961 (2).

Rebuttal: Evidence that cross-ties placed at switch on line of railway company had never been inspected or received by company rebutted presumption arising as to acceptance and use from fact that they were removed by some one. 16 App. 314 (85 S. E. 285).

Resale: Where purchaser of certain property agrees to give to seller half of any net profits accruing from resale thereof, there can not ordinarily be recovery under the agreement until the proceeds of the resale have been reduced to money, or so appropriated as to constitute complete equivalent to reception of their money value. 21 App. 630 (3) (94 S. E. 841).

Sawmill: Answer in nature of cross-petition, in suit to enjoin assertion of claim upon property or interference with possession and to recover balance due on account of money advanced, alleging refusal to continue to operate sawmill because plaintiff had breached its contract to pay expenses of erecting mill plant, etc., set up demand for damages for breach and not suit for recovery of property. 148/847 (1) (98 S. E. 498).

Special damages: Breach of contract gives right of action whether special damages be alleged or not, and therefore excluding from declaration all

averments of special damage will not warrant court in dismissing action. 24 App. 514 (3) (101 S. E. 310).

Tender of cash must be made by purchaser suing vendor for breach of contract to convey, unless it is waived. 140/719 (2) (79 S. E. 775).

Proposition for owner to bring or send to a city in another State a conveyance to a purchaser from plaintiff, and receive payment, or that such proposed purchaser would send check to bank to be delivered upon the delivery of conveyance, did not amount to a tender. *Id.* 719, 720 (3-b).

Timber: Petition alleging defendants' breach of contract, whereby he was to be paid certain amount per thousand feet for all lumber and ties cut from lands of defendants, and to have absolute control of operations of sawmills and disposition of lumber held to state cause of action. 147/401 (1) (94 S. E. 303).

Fact that plaintiff voluntarily indorsed note for one of the defendants gave him no additional right of action in action against defendants for their breach of contract as to cutting and sale of timber from their lands. 147/401 (1) (94 S. E. 303).

Petition averring defendants' breach of contract giving him exclusive control of cutting and sale of timber from certain defendants' lands, held not to state cause of action as to other defendants whom he engaged to saw the timber, etc. 147/401 (1) (94 S. E. 303).

Count alleging performance by plaintiff and partial breach by defendant of express terms of written contract, whereby it had been mutually agreed that defendant was to cut and deliver for sawing at plaintiff's mill all the timber on certain land, and plaintiff was to remove his mill to said land, and was to saw all the timber which defendant had thus obligated himself to cut and deliver, set out good cause of action. 23 App. 644 (2) (99 S. E. 228).

Petition, in suit on contract, whereby plaintiff was to furnish timber from certain described land, all of which defendant was to cut into lum-

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her and sell at its sawmill, and to furnish lumber and crossties at stipulated prices, alleging that land contained timber from which defendant could have furnished the lumber under the contract, his failure to cut and furnish such crossties, plaintiff's performance, and damages from defendant's breach, set out cause of action. 24 App. 719 (3) (102 S. E. 171).

Title: Where vendor repudiates conditional contract to convey a clear title, and the purchaser waits until after time fixed for conveyance, and then

sues for the difference between the contract price and the market value and for expenses of examining title, he must allege that the vendor had a clear title or one which he was willing to accept as such. 141/418 (81 S. E. 203).

Waiver: Knowledge is essential as basis for assent, and it will not be held that one has waived violation of contract right when he has no knowledge that it has been violated. 14 App. 8 (80 S. E. 24).

§ 4390. (§ 3794.) Liquidated damages.

Amount of damages: Stipulation for liquidated damages in sum of \$5,000 in case of breach of contract to buy land valued at \$69,000 was not reviewable. 144/660 (87 S. E. 902).

Whether amount stipulated in contract is liquidated damages under this section was unreasonable and a penalty under section 4391 was question for the court. Id.

Where verdict establishes liability for personal injuries, and proof shows actual damages resulting, in lost time and service, medical attention, etc., amounting to \$107, and also pain and suffering, verdict for \$1.00 for plaintiff was grossly inadequate and contrary to law and evidence. 19 App. 51 (90 S. E. 732).

Attorney: It is necessary to allege in action against attorney at law to recover amount of claim alleged to have been lost because of his negligence or misconduct not only that the claim was a valid one, but that debtor was solvent. 19 App. 242 (1) (91 S. E. 265).

Where, because of negligence or misconduct of attorney at law, claim of client has been lost, attorney is liable only for actual injury his client has received, and not for mere nominal

amount involved in the litigation. 19 App. 242 (1) (91 S. E. 265).

Building contractor abandoning work and refusing to permit owner to complete work under clause of contract, latter may sue on provision specifying liquidated damages for delay by contractor. 142/703 (1) (83 S. E. 660).

Cropper: If cropper was entitled to recover for value of cotton sold by defendant landlord, measure of damages would be market value of his share at time of breach of contract or at time of demand made by him upon landlord for settlement. 24 App. 519 (2) (101 S. E. 192).

Land: The measure of damages for breach of contract for sale of land is difference between contract price and market price at time of breach. 145/65 (3) (88 S. E. 960); 18 App. 178 (89 S. E. 175).

Sale: While, under contract for sale of automobiles here, manufacturer could decline orders and limit of liability was right of dealer to cancel agreement, yet where manufacturer, despite previous breaches by dealer, accepted orders, such acceptance was a waiver, rendering manufacturer liable for damages for failing to fill orders accepted. 18 App. 365, 366 (1) (89 S. E. 430).

§ 4391. (§ 3795.) Penalties.

Amount of damages: Whether amount stipulated in contract of sale of realty as liquidated damages under section 4390 was unreasonable and a penalty under this section was ques-

tion for the court. 144/660 (87 S. E. 902).

Bond: Where petition for injunction is filed and prayer therein for interlocutory injunction is denied, and

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judge passes order authorizing plaintiff, on filing bill of exceptions, to give supersedeas bond to defendant, conditioned to pay defendant certain sum of money in event said judgment is not reversed, and such bond is given, the bond is breached when the appellate court, in its judgment on the writ of error, does not reverse judgment of lower court. 22 App. 411 (96 S. E. 391).

Calculation of damages: Where parties to contract mutually agree that on failure or refusal of one to comply with its terms he shall pay other certain sum reasonable in amount, and proper construction of whole contract shows that actual damages from breach were subject matter of calculation and adjustment between parties, and that specified sum was really intended as actual compensation and not as penalty, law would enforce contract as made according to its intent. 24 App. 635, 636 (2) (101 S. E. 588).

Excess: Where contract contains several stipulations, and provides for liquidated damages for breach, and it is apparent that damages which could result from breach of some of the stipulations would be so small as to make the stipulated amount excessive and unjust, such amount will be held to be in the nature of a penalty, and not liquidated damages. 145/484 (3) (89 S. E. 615).

Ferry: Contract between county and ferry company, whereby county was to construct landing and company to operate ferry, under certain rules providing that "should said ferry company,

or their lessees' for any reason except that said landing or causeway be destroyed by storm or freshet, abandon said service before the end of said period," ferry company was to reimburse county amount spent in constructing landing, not to exceed \$3,000, was illegal and unenforceable as stipulating for a penalty. 24 App. 559 (101 S. E. 762).

Note: Where, in action by transferee of note reciting that it was one of a series given for purchase price of land described in bond for title, it being agreed that if note sued upon was not paid at maturity it should become rent for land for certain year, defendant's plea did not allege that amount of note was not fair rental for land, or was in excess of such legal damages for breach of contract as could be actually computed, no sufficient defense was interposed. 22 App. 223 (95 S. E. 724).

Rent: Where defendant contractor by amendment set up that sum provided in contract with owner as penalty for delay actually represented rental value of property, and did not attempt to strike averments of original plea wherein sum provided for in contract was plainly sued for as penalty, or show that sum sued for was agreed upon by contractor and owner as stipulated damages representing rental value, or allege payment of such sum by contractor to owner, plea was properly construed as seeking to enforce illegal penalty. 24 App. 635, 636 (2) (101 S. E. 588).

§ 4392. (§ 3796.) Expense of litigation.

Amendment which set up that defendant railroad company, acting in bad faith and to put plaintiff to all possible expense, had refused to pay damages agreed on for killing cow, and which claimed damages on account thereof, properly allowed, in view of this section. 15 App. 289 (1) (82 S. E. 906).

Attorney's fee: Requested instruction that under the law, attorney's fees and expenses of litigation are not recoverable as damages, that it is contrary

to the policy of the law to permit the plaintiff to recover attorney's fees as part of the damages claimed, properly denied. 21 App. 209, 210 (4) (94 S. E. 86).

Bad faith: Expenses of litigation are not recoverable in action for breach of contract when it does not appear that contract was entered into in bad faith or procured by fraud, or that defendant had been stubbornly litigious. 145/106 (4) (88 S. E. 569).

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"Bad faith" which will authorize recovery of attorney's fees is bad faith in the transaction out of which the cause of action arose. 22 App. 578 (1) (96 S. E. 437).

Evidence to show that defendant had acted in bad faith and put plaintiff to unnecessary trouble was properly admitted, though insufficient, to es-

tablish allegations of amendment setting up plaintiff's right to recover expenses of litigation, pursuant to this section. 15 App. 289 (1) (82 S. E. 906).

Jury: Whether plaintiff is entitled to recover expenses of litigation is matter solely for jury. 15 App. 680 (4) (84 S. E. 163).

§ 4394. (§ 3798.) Remote damages.

Cited. 14 App. 674, 683 (82 S. E. 166).

Stated. 140/51 (2) (78 S. E. 413); 142/305, 306 (2) (82 S. E. 886).

Charge: Instructions on damages which, while correct abstract statements of the law, were inapplicable to facts in case, were erroneous. 24 App. 633 (3) (101 S. E. 693).

Contemplation of parties: Remote, consequential, or speculative damages that could not have been reasonably in contemplation of parties as result of breach of contract can not be recovered. 18 App. 391, 392 (3) (89 S. E. 435).

Expenses: Damages recoverable for breach of agreement to lease property include expenses incurred by proposed lessee which were naturally and proximately caused by such breach, but not expenses which could not reasonably have been anticipated. 14 App. 158 (3) (80 S. E. 668).

Landlord and tenant: Sublease providing that lessor should supply gas, heat, steam power, etc., and providing that if he should be unable to procure coal, after reasonable efforts, failure would not render him liable to the lessee, was sufficiently certain to be basis of suit for damages for breach whereby lessee was deprived of its enjoyment; damages claimed were not too remote or speculative. 148/624 (1) (97 S. E. 678).

Where lessor in pursuance of contract furnished tramroad, engine and cars, and lessees accepted and used them in their business, claim for damages by lessees, based upon alleged defective condition of road and equipment, for alleged profits which lessees would have earned in operating mill

if road and equipment had been in good condition, was too remote and speculative to be basis for recovery. 148/847, 848 (2) (98 S. E. 498).

Opinion: Claims of damage under breach of contract that are speculative in character and incapable of reasonably exact computation cannot be basis of recovery; mere opinion of agent selling on commission as to what sales he could have made but for breach of contract does not afford sufficient certainty to be basis of recovery in damages. 18 App. 446 (1) 89 S. E. 535).

Pleading: Petition in action for breach of lease of granite quarries here was not demurrable on ground that allegations of damages were too vague, indefinite, and speculative to be basis of recovery. 142/305, 307 (2-a) (82 S. E. 886).

Profits: Where plaintiff bought bananas and paid part of price, and defendant sold them to third person, profits which plaintiff might have realized on resale were too remote and speculative to be recoverable as damages. 14 App. 84 (80 S. E. 339).

Current profits of going manufacturing concern are, as general rule, too uncertain to form basis of award of damages for breach of contract affecting operation of plant. 20 App. 474 (2) (93 S. E. 155).

Damages alleged to have been sustained because of nondelivery of message to charter vessel for shipment of lumber to Europe were too remote, uncertain, and conjectural to authorize recovery, where petition nowhere alleged that plaintiff sold the timber at a price certain, or that he had a purchaser, but merely alleged that plaintiff could have sold in Europe at

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the market price. 21 App. 737 (94 S. E. 1033).

Prospective profits from business which would have been sent to plaintiffs had not defendant breached its contract to advertise and recommend plaintiffs, a firm of attorneys at law, as its representatives in its "law list" and directory, were too remote, uncertain, and speculative. 22 App. 368 (95 S. E. 1012).

Sales: While damages complained of here could possibly be traced to defects in castings furnished to manufacturer of patented article, they were remote and consequential, and not the natural consequence of a breach of the contract, under which if defective castings were furnished, the buyer could secure good ones by applying to the seller, and they were not such damages as the parties to the contract contemplated at time contract was made, as the probable result of its breach. 21 App. 23 (2) (93 S. E. 527).

§ 4395. (§ 3799.) **Damages contemplated by parties.**

Stated. 142/305, 306 (2) (82 S. E. 886).

Bailment: Where petition against bailee for hire absolves him from any lack of diligence, except as to specific complaint setting up total failure to perform special duty imposed by contract, neglect of which duty could not naturally and in usual course of things occasion damage complained of, it was not error to dismiss suit as failing to set forth cause of action. 22 App. 193, 194 (3) (95 S. E. 752).

Castings: While damages complained of here could possibly be traced to defects in castings furnished to a manufacturer of a patented article, they were remote and consequential, and not the natural consequence of a breach of the contract, under which if defective castings were furnished, the buyer could secure good ones by applying to the seller, and they were not such damages as the parties to the contract contemplated at time contract was made, as the probable result of its breach. 21 App. 23 (2) (93 S. E. 527).

Petition seeking damages from vendor of fertilizers because of failure to deliver portion of lot of guano contracted for, resulting in consequent failure of portion of purchaser's land to produce as much corn and cotton as he would have done with the fertilizer, properly dismissed on demurrer, even though petition alleged that land on which guano was used produced more than that upon which it was not used, and though all the land received same cultivation and attention and had the same seasons. 23 App. 660 (2) (99 S. E. 132).

Where plea of defendant contractor did not allege any necessary reason for trip to another city because of plaintiff's failure to deliver purchased building material within agreed time, and it did not appear that expenses of such trip set out as damages directly or logically resulted from plaintiff's delay, they were an improper charge. 24 App. 635, 637 (3) (101 S. E. 588).

Charge: Instructions on damages which, while correct abstract statements of the law, were inapplicable to facts in case, were erroneous. 24 App. 633 (3) (101 S. E. 693).

Compensation: Underlying principle in fixing damages for breach of contract is compensation to injured party, and damages recoverable are such as arise naturally and according to the usual course of things, and such as the parties contemplated when the contract was made as the probable result of its breach. 265 Fed. 961 (1).

Continuing contract: Where tender of anticipatory breach of contract has been accepted and suit at once commenced, injured party may recover entire value of his contract, as if breach continued to date fixed for performance; generally his measure of damages, as under contract of sale and purchase, is difference between contract price and market price on date fixed for performance. 20 App. 660, 661 (2) (93 S. E. 532).

Though plaintiff sues at once for anticipatory breach of contract, and trial is had before expiration of con-

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tract, measure of damages is difference between contract price of subject matter of contract and market price at time and place of performance and not at time of breach; this is true although subject matter is an article usually and generally, but not exclusively, sold for future or forward delivery. 20 App. 660, 661 (4) (93 S. E. 532).

Where subject matter of contract has no current value, measure of damages for anticipatory breach is generally difference between contract price and cost of production at time for performance, whether trial of action is before or after time fixed for delivery, but cost of production is material only where article has no market or current value, and evidence concerning cost of production is entirely irrelevant where subject matter of contract is sold generally throughout the United States, continental Europe and Japan. 20 App. 660, 661 (5) (93 S. E. 532).

Landlord and tenant: Money expended by tenant for labor and supplies, stock, implements, etc., under lease, and lost to tenant because of hailstorm which made it impossible to continue farming operations, were not recoverable in action for breach of a second lease. 19 App. 677 (92 S. E. 39).

Value of services rendered by tenant in planting cotton under lease contract was recoverable in action against landlord for damages caused by being compelled to abandon contract by reason of landlord taking possession of cotton planted. 19 App. 677 (92 S. E. 39).

State of preparation and condition of farm when tenant entered may be taken into consideration in estimating value of lease. 19 App. 677 (92 S. E. 39).

Where actual value of lease exceeds amount of rent to be paid, tenant may have recovery on that account where lease has been breached by landlord. 19 App. 677 (92 S. E. 39).

§ 4396. (§ 3800.) Interest.

Cited. 142/305, 306 (2) (82 S. E. 886).

Stated. 145/836, 838 (11) (90 S. E. 61).

Pleading: Plaintiff should allege facts showing that damages claimed fall within this section. 140/51 (3) (78 S. E. 413).

Sales: Under this section and section 4402, on breach of sale contract, seller may recover damages naturally arising and such as were contemplated, and necessary expenses incurred, but such sections do not apply where property has been rejected and resold. 16 App. 470 (2) (85 S. E. 677).

Petition seeking damages from vendor of fertilizer because of failure to deliver portion of lot of guano contracted for, resulting in consequent failure of portion of purchaser's land to produce as much corn and cotton as he would have done with the fertilizer, properly dismissed on demurrer, even though petition alleged that land on which guano was used produced more than that upon which it was not used, and though all the land received same cultivation and attention and had the same seasons. 23 App. 660 (2) (99 S. E. 132).

Sawmill machinery: Measure of damages for alleged breach of contract in taking so much of sawmill outfit as was owned by defendants should be upon basis of fair market value of that property at date it was taken, and not for any amount of money that may have been advanced by defendants for equipment, maintenance, or improvement of the property. 148/847, 848 (3) (98 S. E. 498).

Special damages: Where, in suit for damage to certain property, items of damage are set forth in petition and amount in aggregate to stated sum, alleged to be market value of the property, which is total amount sued for, and evidence fails to show market value of property, plaintiff is not entitled to recover general damages or nominal damages, but is confined to special damages set forth. 18 App. 367 (89 S. E. 441).

Automobile dealer: In action against manufacturer for breach of dealer's contract or agreement to sell its automobiles, erroneous charge that jury, if

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they found a breach, should find interest from date of breach at seven per cent., was cured where court ordered plaintiff to write off interest found by jury. 24 App. 633, 634 (5) (101 S. E. 693).

In action against manufacturer for breach of dealer's contract or agreement to sell its automobiles, the jury, if finding interest recoverable at all, could only allow legal interest from breach of contract by manufacturer's refusal to ship cars on dealer's orders after acceptance and within reasonable time after shipment. 24 App. 633, 634 (5) (101 S. E. 693).

Mortgage: Where purchaser was given possession and made part payment under contract providing for giving of series of notes, upon vendor's paying off mortgage on property, she was not chargeable with interest on unpaid purchase-money for the time vendor delayed removing the mortgage after the time stipulated by the

contract. 141/438, 439 (1) (81 S. E. 201).

Unliquidated damages: Where plaintiff, in addition to suing for special elements of damage such as lost time, doctor's bills, and damage to an automobile, sued for personal injuries and for pain and suffering, it was reversible error for the court to charge that the jury had the right to add to any damages they might find for plaintiff seven per cent. interest for such time as they saw proper to do so, taking into consideration the time of the injury, or the length of time that the damages had been withheld. 23 App. 96 (4) (97 S. E. 553).

Verdict: Point that verdict should have specified damages in solido, instead of finding designated sum with interest thereon, can not be raised under general ground that verdict is contrary to law and contrary to evidence. 22 App. 32 (2) (95 S. E. 332).

§ 4397. (§ 3801.) Nominal damages.

Cited. 143/497, 502 (85 S. E. 742).

Amount: Term "nominal damages" is purely relative and carries with it no suggestion of certainty as to amount. Verdict for nominal damages cannot be set aside as obtained by prejudice or bias or by mistake of jury solely because amount is large. 14 App. 173 (1) (80 S. E. 516).

Recovery of \$150 by ejected passenger as nominal damages was not excessive, there being no statutory limitation upon amount of such damages. Id. 173 (2).

Charge: Error in reading to jury that part of this section relieving defendant of costs where tender equals that which plaintiff recovers, when there was no evidence of such tender, was harmless where it could not have influenced verdict. 14 App. 619, 620 (4) (82 S. E. 299).

Cropper: Whatever measure of damages may be where landlord wrongfully refuses to perform his part of contract with his cropper, right of action arises upon breach of contract, and any action therefor brought after the

breach is not premature. 22 App. 284 (2) (96 S. E. 16).

New trial: Denial of new trial on ground that nominal damages allowed were excessive will not be interfered with in absence of clear abuse of discretion. 14 App. 173 (1) (80 S. E. 516).

Pleading: That plaintiff might have recovered nominal damages under appropriate allegations and prayers held here not ground for reversal of judgment for defendant. 141/418 (81 S. E. 203).

Breach of contract gives right of action even where special damages are not alleged. 18 App. 479, 483 (89 S. E. 631).

Special and punitive damages: Where plaintiff in suit for special damages alone is not entitled to recover special damages sued for, there can be no recovery of general or nominal damages. 22 App. 578 (4) (96 S. E. 437).

Where plaintiff in suit for special damage alone is not entitled to recover special damages sued for, there can be no recovery of general or nominal

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damages. 23 App. 660 (3) (99 S. E. 132).

Telegram: Where petition in action against telegraph company sets forth breach of public duty owing to plain-

tiff, and prays for nominal damages, dismissal of action on general demurrer was error. 23 App. 479 (4) (98 S. E. 407).

§ 4398. (§ 3802.) **Plaintiff bound to lessen damage.**

See notes to § 4426.

Charge: Error, if any, in failure of court, in absence of timely written request, to charge this section, was harmless. 19 App. 472, 473 (6) (91 S. E. 892).

Charge that where, by breach of contract or negligence, one is injured, he is bound to lessen damages as far as practicable by use of ordinary care and diligence; "that is, if defendant in this case discovered that article sold was of inferior value, it was his duty to do everything possible to overcome defects at as little expense as possible," was inaccurate and misleading, in that it instructed jury that they could consider general value of article sold and were not restricted to consideration of specific defects alleged in defendant's plea. 23 App. 761 (3) (99 S. E. 312).

Under facts of case here it was error for court to charge that if defendant did not put defendant on notice that material was to be used for any specific purpose, "then what I have charged you with regard to going into the open market and buying other material would not apply to this case or to this condition." 24 App. 659 (101 S. E. 777).

Executory contract: While one repudiating executory contract before time of performance has arrived can not call upon opposite party to make forward contract for his benefit, for purpose of lessening the damages, yet, if opposite party accept tender of breach, he is bound to abate his damages by reason of circumstances of which he ought reasonably to have availed himself. 20 App. 660, 662 (7) (93 S. E. 532).

Expenses reasonably and necessarily incurred by defendant contractor for purpose of lessening damages, and made necessary by plaintiff's breach in failing to furnish material accord-

ing to its contract, may properly be pleaded in defense in plaintiff's action on contract. 24 App. 635, 637 (4) (101 S. E. 588).

While part of extra expense, alleged by contractor to have been incurred, was for extra priced labor performed on Sunday, which was illegal, and for which defendant could not recover, disallowance of such illegal part of claim was matter for special and not general demurrer. 24 App. 635, 637 (4-a) (101 S. E. 588).

Landlord and tenant: Where relation of landlord and cropper exists, and landlord wrongfully refuses to perform contract, cropper has three courses of procedure open: (1) If landlord's breach consists solely of refusal to furnish articles which may be obtained elsewhere, cropper may obtain them, complete contract as contemplated, and hold landlord and landlord's share of crop responsible for actual damages resulting; or (2) cropper may sue immediately for his special injuries, if any, including value of services rendered; or (3) he may wait until expiration of harvest season and sue for full value of his share of crop or what his share would reasonably have been under faithful performance of contract by both parties. 22 App. 284 (1) (96 S. E. 16).

Passenger: Where, in action for carrying sick passenger beyond destination, court charged that plaintiff only sought damages for injury which aggravated pain he was already suffering, failure to charge that one injured by breach of contract must lessen damages as far as practicable by ordinary care, was not error, in absence of request. 14 App. 311, 312 (5) (80 S. E. 725).

Pleading: Error in striking paragraph of petition because it illustrated good faith and diligent conduct of plaintiff in seeking to avoid damages resulting

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from defendant's breach, if any, was harmless, where other paragraphs of petition set out sufficient facts to show alleged good faith of plaintiff. 22 App. 578 (1) (96 S. E. 437).

Shipment: Conflict in evidence as to time when defendant notified plaintiff that it would not comply with its contract to ship cotton not as matter of law raised the issue that plaintiff was lacking in ordinary care and diligence to lessen the damages by reason of advanced knowledge of defendant's intention to breach the contract. 20 App. 256 (1) (92 S. E. 1008).

Warranty: Plea that plaintiff for small sum could have settled suit to recover interest in land, and that defendant warrantor should not be held

liable for sum greater than such sum, was demurrable, this section being inapplicable. 143/421 (1) (85 S. E. 338).

Water: Where act complained of is positive tortuous act committed by defendant in allowing injurious and poisonous chemicals to pollute water of stream flowing through lands of plaintiff and thereby to produce a continuous adulteration of the plaintiff's water, and not resulting merely from negligence, plaintiff was not bound to do anything to avoid the consequence arising from the invasion of her right to enjoy her property to its fullest extent. 21 App. 547, 550 (5) (94 S. E. 846).

§ 4399. (§ 3803.) Discretion of jury as to damages.

Cited. 18 App. 396 (1) (89 S. E. 493).

Amount of damages: Where evidence authorized only verdict for nominal damages, verdict for \$550.00 was excessive. 18 App. 196, 197 (5) (89 S. E. 188).

Jury: Question of amount of damages is for jury, and court should not interfere unless there is something in the record or in the amount awarded to indicate that the verdict was the result of prejudice or bias on part of jury. 19 App. 186 (2) (91 S. E. 254).

Mistake: Verdict here of \$11,600 was not so excessive as to justify infer-

ence that it was induced by gross mistake, bias, or corrupt means. 18 App. 266, 267 (7) (89 S. E. 384).

Set aside: Verdict will not be set aside on ground that it is excessive, where it does not manifestly appear that amount awarded was result of bias, prejudice or other corrupt motive. 142/401 (5) (83 S. E. 107).

Verdict cannot be set aside for inadequacy of damages, where it does not appear that there was gross mistake or bias. 17 App. 574 (1) (87 S. E. 835).

§ 4400. (§ 3804.) On covenants of warranty to land.

Consideration: Under sections 4400 and 4402, where, in action for breach of covenant of warranty, there is no question as to value of improvements or expenses in complying with contract, measure of damages is amount received by vendor, with interest thereon from date of sale. 145/347 (2) (89 S. E. 199).

Exchange of property: Evidence in action for breach of warranty as to consideration for land that it was an even exchange of real estate, without identifying land received and showing value, does not show right to recover actual damages. 145/347 (2) (89 S. E. 199).

Lease: Measure of damages for breach of lease of granite quarries obligating lessor to protect plaintiff against any interference by the owners of the property was not fixed by this section. 142/305, 307 (4) (82 S. E. 886).

Nominal damages: Where plaintiff in action for breach of covenant of warranty proves such warranty and breach, and his right to sue, he is entitled to recover nominal damages, and grant of nonsuit was error. 145/347 (3) (89 S. E. 199).

Profits: Damages recoverable for breach of warranty include all legal damages sustained, excluding anticipated profits and the like, which were too

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speculative to be basis of recovery. 14 App. 303 (5) (80 S. E. 735).

Value of property: Enhancement in value of property accrues to benefit

of purchaser, and not to that of the warrantor, and is immaterial in action for damages for breach of warranty. 143/421 (2) (85 S. E. 338).

§ 4401. (§ 3805.) **On bond for titles.**

Assignee of bond acquires all the rights and equities of the assignor thereunder. 13 App. 112 (1-b) (78 S. E. 942).

Equitable relief: Maker of promissory notes given for purchase price of land of which maker holds undisturbed possession under bond from vendor, conditioned to make good and sufficient title upon payment of notes, can neither voluntarily rescind contract of purchase nor defeat collection of notes, upon ground that vendor has not in fact good title, without showing clearly paramount outstanding title against vendor, and also proving fraud upon his part, or that he is insolvent, or nonresident, or else proving other facts which would authorize equitable interference with carrying out of contract. 146/524 (1) (91 S. E. 684).

Insolvency: Allegation that man is worth but little, and not as much as home-stead, and is head of family, not equivalent to allegation that he is insolvent. 143/549 (85 S. E. 692).

Plea: Where affirmative pleas fail to state valid defense against claim of plaintiff for breach of contract, court did not err in striking them on demurrer; pleas having been stricken, verdict for plaintiff necessarily followed. 146/261 (91 S. E. 36).

Resale: Obligor making deed to third person breaches the bond. 13 App. 112 (2) (78 S. E. 942).

Obligor who executed deed to third person can not defend action by assignee of bond for breach of obligation on ground that assignee knew of the deed, unless he shows that assignee acquiesced in or consented to execution of deed. Id. 112 (3).

§ 4402. (§ 3806.) **Necessary expense.**

Charge: Even where it is proper to charge on subject of expense incurred in complying with contract, and such charge is requested, it must be correct and it must appear that the expense was necessary. 22 App. 199, 200 (3) (95 S. E. 737).

Sales: Under this section and section 4395, on breach of sale contract seller may recover damages naturally arising and such as were contemplated, and necessary expenses incurred, but such sections do not

apply where property has been rejected and resold. 16 App. 470 (2) (85 S. E. 677).

Under sections 4400 and 4402, where, in action for breach of covenant of warranty, there is no question as to value of improvements or expenses in complying with contract, measure of damages is amount received by vendor, with interest thereon from date of sale. 145/347 (2) (89 S. E. 199).

Torts; general principles, and herein of fraud and deceit.

NINTH TITLE.

Of Torts, or Injuries to Persons or Property.

CHAPTER 1.

General Principles, and Herein of Fraud and Deceit.

§ 4403. (§ 3807.) **What are torts.**

2.

Bridge: Where petition alleged that plaintiff's mule, which was hitched to buggy, became frightened at hole in bridge and some elevated pieces of the flooring, but evidence failed to sustain such allegations as to cause of injury, plaintiff could not recover. 17 App 817 (88 S. E. 714).

Electric-light: Company should so construct system that persons traveling on streets will not be endangered, but owes no absolute duty to employ safeguards "best known and most extensively used." 16 App. 17, 18 (3) (84 S. E. 493).

3.

Bailment: Where constructual relation of bailor and bailee exists between parties, whereby duty is imposed by law upon bailee as being incident to and arising out of contract of bailment, complainant setting up breach of duty may elect to proceed for damages as in case of tort. 22 App. 193 (2) (95 S. E. 752).

Contract: Not every breach of contract gives cause of action in tort; where breach complained of is simply neglect of duty such as is expressly provided for by contract itself, action will be construed and treated as one brought ex contractu. 22 App. 193 (2) (95 S. E. 752).

General Note.

Stated. 20 App. 438, 439 (93 S. E. 16).
Cited. 16 App. 725, 727 (86 S. E. 86).

Accident: Where plaintiff's injuries were result of casualty intermixed with negligence of defendant, nonsuit properly granted. 13 App. 452 (79 S. E. 225).

Arrest of plaintiff by station policeman at instance of gateman, when he passed through gate of station on way to mail train, after he had requested them to allow him to go through the gate to mail his letters and they had refused him permission, did not give him right of action against the station company, although he alleged that it was customary for people generally to go to the mail train to mail letters, and that persons who were not

passengers and who stood on same footing with him were permitted by gatekeeper to pass through the gates. 18 App. 570 (90 S. E. 84).

Conspiracy: Where two or more persons are charged with conspiring or entering into mutual scheme to defraud, such conspiracy scheme may be shown by proof of facts evincing concurrent knowledge and approbation in persons conspiring, of each other's acts, and by proof of separate acts of the several persons concentrating in the same purpose or particular object. 24 App. 727, 728 (2) (102 S. E. 192).

Petition alleging that three named persons, at time stated, entered into conspiracy to wrongfully withhold from plaintiff certain securities and

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to convert same to joint use and benefit of said persons, that defendants in furtherance of the conspiracy withheld such securities from plaintiff and on day named did convert same to their own joint use and benefit, to the loss and injury of plaintiff in sum alleged as actual value of securities on date of conversion, sufficiently set forth conspiracy as against general demurrer; nor was petition subject to special demurrer on ground that it lacked sufficient facts or overt acts to support charge of conspiracy. 149/67 (2) (99 S. E. 123); 23 App. 736, 737 (2) (99 S. E. 393).

Cropper: Where, in action against a landlord and her cropper for injuries caused by fire "put out" by the latter, there was sufficient evidence to authorize jury to find for plaintiff, though not requiring such a verdict, it was error to grant nonsuit as to defendant cropper. 23 App. 284, 285 (2) (98 S. E. 92).

Disease: Where plaintiff alleged and proved that he was in livery business and was owner of horses which were sound and in good condition, that defendant, as agent of owner of certain mules, induced plaintiff to take them into his stables, falsely representing that they were sound and well, that plaintiff fully believed and relied on such representations, that the mules had a contagious disease of which plaintiff was ignorant, and which they communicated to plaintiff's horses, by reason of which the horses became sick and died, jury properly returned verdict in favor of plaintiff for his

actual damages. 21 App. 280 (1) (94 S. E. 283).

Licensee on premises of another, there to cut down trees, should use ordinary care to see whether or not a cow, which he had previously noticed to be only 150 feet away, had moved near enough to be in danger from falling tree. 18 App. 648 (5) (90 S. E. 224).

Matter of law: No act can be affirmed to be negligence, as a matter of law, unless it has been made so by statute. 13 App. 86 (2) (78 S. E. 827).

Telephone company required to exercise only ordinary care promptly to furnish a subscriber means of communication over lines with other subscribers, and failure to exercise such care authorizes recovery of damages proximately resulting. 13 App. 520 (3) (79 S. E. 488).

In action for negligent failure to give subscriber a connection, burden is on plaintiff to prove negligence. *Id.*

Where telephone company provides a delicate mechanism of the most approved kind to operate a bell to awaken the night operator, and exercises ordinary care to keep the same in order, and the mechanism gets out of order, company is not liable for damages for failure of subscriber to secure telephonic connection. *Id.*

Telephone company can not, by ceasing to use part of its line and disconnecting that part from part which continues in use, relieve itself from duty to exercise care to prevent injury from unused part. 16 App. 864 (2) (87 S. E. 766).

§ 4405. (§ 3809.) Breach of legal duty gives action.

Bottled beverage: Manufacturer was liable to person rendered sick by drinking beverage from bottle containing body of dead and putrid mouse. 18 App. 226 (2) (89 S. E. 495).

Carrier: Action against carrier for damages to shipment of apples is one for failure to perform legal duty, and is one *ex delicto*. 17 App. 5 (1) (86 S. E. 252).

Electricity: Public-utility corporation furnishing electric current to individual who maintains connecting private

line and all attached equipment, free from control or inspection of corporation, is not responsible for damages on account of deterioration of private line and consequent defects therein, resulting in injury to trespasser coming in contact with it on private premises, not adjacent to path in general use by public, when private line was not properly constructed originally, but safely connected with line of corporation, and there was no knowledge on part of corporation as to subse-

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quent deterioration of private line. 22 App. 474 (1) (96 S. E. 569).

Procuring breach of contract: Petition in action against chair company for damages alleging that a sprinkler company had a contract with defendant to install sprinkler system, and employed plaintiff to perform mechanical labor of installing this system, agreeing to pay him \$2 a day for his time and labor, and that, with knowledge of this, president of chair company, acting with authority for the chair company, after plaintiff had worked

part of a day, tortuously forbade his working or coming on the premises, and had the sprinkler company discharge him, to his loss and damage, for which he sued, set forth a cause of action. 22 App. 307 (1) (95 S. E. 997).

Telephone wire: Charge here, in action for death from contact with telephone wire charged with electricity, as to notice requisite to charge defendant with liability, was proper. 16 App. 864 (3) (87 S. E. 766).

§ 4406. (§ 3810.) Breach of private duties.

Automobile: Petition alleging that because of cloud of smoke caused by negligent use of kerosene instead of gasoline in cleaning crank-case of automobile obstructing view plaintiff was hit and injured by another automobile was not subject to general demurrer. 22 App. 532 (96 S. E. 573).

Electric wires: Petition alleging that electric wire which extended from top of pole down its side to lead pipe about four feet above the ground had been broken off at top of lead pipe and was loose, that such condition had existed for several months, that the wire was loose at the top also and that the blowing of the wind caused it to come in contact with current-carrying wires, that as result of dangerous dangling of wire the petitioner, a boy of thirteen years, who had taken hold thereof, was severely injured, etc., stated good cause of action against lighting company owning the poles and wires. 20 App. 8 (92 S. E. 772).

Gas company which produces and furnishes gas is bound to use such skill and diligence in its operations as is proportionate to the delicacy, difficulty, and nature of that particular business. 18 App. 454 (89 S. E. 532). See 19 App. 541 (91 S. E. 1007).

Gas company which produces and furnishes gas, before turning on or permitting to be turned on gas for benefit of tenant in apartment house who has applied for it, must use reasonable precautions to ascertain that pipes in such building are in such condition that gas will not flow into apartments of tenants who have not applied for it, to their injury. 18 App. 454 (89 S. E. 532). See 19 App. 541 (91 S. E. 1007).

It is for jury to say whether or not gas company, before permitting gas to be turned on for benefit of one tenant of apartment house, used reasonable precautions to ascertain that no harm would thereby result to other tenants who had not applied for it, by gas escaping into their rooms. 18 App. 454 (89 S. E. 532). See 19 App. 541 (91 S. E. 1007).

Gas company can not deny liability for injuries resulting from failure to use reasonable precautions, before turning gas into apartment building, to see that injury could not result from escape of gas into rooms of tenants not applying for it, on ground that it had no right to enter on premises of such tenants to make inspection of pipes. 18 App. 454 (89 S. E. 532). See 19 App. 541 (91 S. E. 1007).

§ 4405. (§ 3809.) Breach of legal duty gives action.

Stated. 20 App. 438, 439 (93 S. E. 16). Applied. 17 App. 779, 783 (88 S. E. 703).

Amendment: Where plaintiff elected to sue in tort, by action of bail-trover,

action was not amendable by striking the trover suit and setting up cause of action ex contractu. 19 App. 548 (1) (91 S. E. 1005).

Bailee: Tort arising out of bailee's

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breach of duty may be waived by bailor, and action of assumpsit maintained on his express or implied promise to discharge such duty. 14 App. 597 (2) (81 S. E. 800).

Where contractual relation of bailor and bailee exists between parties, whereby duty is imposed by law upon bailee as being incident to and arising out of contract of bailment, complainant setting up breach of duty may elect as to his remedy and rely upon either his right under the contract or proceed for damages as in case of tort. 22 App. 193 (2) (95 S. E. 752).

Conversion: Where defendant alleged that he had previously filed, and that there was then pending, an action in trover to recover cotton, for the conversion of which he sought to recoup damages as against the suit brought by plaintiff upon his note, he was concluded by his election, and the court did not err in striking the plea. 13 App. 180 (1) (78 S. E. 1013).

Where railroad company wrongfully refuses to deliver to consignee car of coal, and converts it to its own use, consignee may waive tort and sue on implied promise to pay for coal. 14 App. 366 (3) (80 S. E. 912).

One whose personal property has been wrongfully withheld or converted by another may proceed by trover to recover it, or he may waive the tort, adopt the transaction, and treat the wrong-doer as his debtor for the purchase price; this is true even where taking of property converted or withheld constitutes larceny. 18 App. 775 (90 S. E. 653).

Where owner of property wrongfully withheld or converted by another elects to sue for value of property on implied promise to pay, action so brought is one arising ex contractu, and not ex delicto. 18 App. 775 (1) (90 S. E. 653).

Vendor of personal property holding note for purchase price, in which title is retained in himself, is not estopped from bringing action of trover for property by fact that he has previously sued out purchase money attachment. 19 App. 159 (3) (91 S. E. 233).

Where one wrongfully takes personalty of another and converts it into

money, latter has right of action ex delicto for wrong done him, but is not restricted to that form of action, and may, as general rule, waive the tort and sue in assumpsit as for money had and received. 19 App. 499 (2) (91 S. E. 912).

Where, in suit on open account for purchase price of personalty, defendant entered only the defense that the goods purchased were worthless, finding for defendant precluded maintenance of subsequent action in trover for recovery of same property. 20 App. 267 (92 S. E. 1012).

Where, in action ex contractu, cross-action is filed by defendant setting up conversion of defendant's property by plaintiff, such cross-action can not be maintained unless it is affirmatively shown that such property has been converted into money; unless this fact is shown, the cross-action can not be construed as an action for money had and received, and a waiver of the tort, but will be construed as an action ex delicto, which ordinarily can not be maintained as a cross-action in an action ex contractu. 21 App. 297 (1) (94 S. E. 317).

Defense: Plea in action by receiver of bank construed as showing that defendant's counter-claim arose ex delicto, tort could be waived and claim set up as defense, as upon implied contract; in such case defendant would not be pleading cause of action arising ex delicto as a defense to action arising ex contractu, but would be pleading claim arising ex contractu as defense to claim arising in same manner. 20 App. 36 (4) (92 S. E. 397).

Drainage: Owner of realty, suing city for damages, can not recover, for damage to freehold, value of earth washed away by negligently maintained drainage, and also recover difference between market value of lot before earth was washed away and its value afterward. 20 App. 601 (3) (93 S. E. 359).

Husband and wife: Suit against husband and wife for purchase price of piano, dismissed as to wife, on general demurrer, did not constitute election to recognize title to piano in her, and record of such suit was properly excluded in trover against her for such

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piano. 22 App. 728, 729 (2) (97 S. E. 197).

Irrevocable: Defendant's election to proceed in trover to recover cotton, for the conversion of which he sought to recoup damages as against suit brought by plaintiff upon his note, was conclusive, and constituted an absolute bar to maintenance of defense he sought to set up. 13 App. 180 (1) (78 S. E. 1013).

Malpractice: Patient, in case of malpractice by physician, ordinarily has choice of remedies, and may sue either

in contract or in tort. 20 App. 325 (4) (4) (93 S. E. 27).

Trespass: Where soil is wrongfully taken from land, owner may waive his right of action for trespass to the realty and recover for soil severed and taken away, or he may recover for diminished market value of the land; he can not recover both market value of soil severed and removed and amount of diminution of market value of land. 20 App. 415 (5) (93 S. E. 24).

§ 4409. (§ 3813.) Fraud and damage give action.

Corporation: One who has been defrauded by false and fraudulent representations as to value of stock in a corporation has his remedy, in an action for tort, against all who participated in the fraud; he may sue the agent or the company itself. 20 App. 374, 379 (5) (93 S. E. 20).

Disease: Where plaintiff alleged and proved that he was in livery business and was owner of horses which were sound and in good condition, that defendant, as agent of owner of certain mules, induced plaintiff to take them into his stables, falsely representing that they were sound and

well, that plaintiff fully believed and relied on such representations, that the mules had a contagious disease of which plaintiff was ignorant, and which they communicated to plaintiff's horses, by reason of which the horses became sick and died, jury properly returned verdict in favor of plaintiff for his actual damages. 21 App. 280 (1) (94 S. E. 283).

Evidence here held to show that defendants had conspired to defraud plaintiff of inheritance and that as result of fraud he had sustained damages. 143/139 (84 S. E. 557).

§ 4410. (§ 3814.) Deceit.

Stated. 20 App. 374, 379 (4) (93 S. E. 20).

Conclusions: Statement that fraud was committed is mere conclusion of pleader; as matter of pleading, fraud is alleged, not by nomenclature, but by stating facts which show its existence. 18 App. 25 (2) (88 S. E. 745).

Corporation: Nonsuit properly directed in suit to rescind purchase of corporate stock and asking judgment for face value thereof, representations not being shown to be false, nor that directors of corporation knew of or authorized them. 19 App. 267 (1) (91 S. E. 345).

Diligence: Instruction in action to recover land from grantor in possession that if defendant signed deed, believing it to be a note, and neither knew, nor in exercise of due care and caution should have known that the

same was a deed, plaintiff ought not to recover, if he was chargeable with knowledge of such facts was erroneous. 142/49, 50 (2) (82 S. E. 440).

False representations relating to easements or appurtenances to land, affecting its value, by owner to another with intent to deceive, and which actually did deceive him to his injury and induced him to purchase property for more than its value, gave right of action of deceit, if falsity of representations could not have been ascertained by examination of premises. 23 App. 428 (1) (98 S. E. 367).

Petition by sheriff alleging that defendant had stated that defendant in a distress warrant had made away with the property which had been levied on, that such statement was false, so as to induce the sheriff to pay damages for failure to have the property

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forthcoming for the sale, while in fact defendant in the distress warrant had paid his rent, stated a cause of action for deceit. 141/33 (80 S. E. 284).

Sale: Before money judgment can be

recovered there must be rescission, as contract is conclusive as long as it stands. 140/112, 117 (78 S. E. 809).

Tort: Action for deceit is action in tort. 20 App. 438, 439 (93 S. E. 16).

§ 4411. (§ 3815.) **Letters to obtain credit.**

False: Petition in action for damages for inducing plaintiff to purchase stock by false representations as to solvency of persons guaranteeing value

of stock was not demurrable, this section not applying. 143/550 (1) (85 S. E. 757).

§ 4412. (§ 3816.) **Torts to wife, etc.**

Burden rests upon father to affirmatively establish that minor son was employed to perform work of specific kind, and that character of employment was changed by defendant without knowledge and consent of father. 18 App. 280 (2) (89 S. E. 451).

Child: Conclusively presumed that infant less than two years old was incapable of performing services of value to its parent. 15 App. 182 (82 S. E. 767).

Question whether infant was capable of rendering valuable services to its parent was for jury where infant was more than two years old. *Id.*

It was not error to sustain demurrer to action brought to recover damages for homicide of child two years and four months old, and thereupon to dismiss petition. 18 App. 171 (89 S. E. 79).

As general rule, parent may recover damages for injury to minor child in course of child's employment, when he was employed without parent's consent, even if there be no negligence on part of employer. 18 App. 280 (1) (89 S. E. 451).

Consent of parent to employment of child may be inferred from knowledge of such employment and his acquiescence therein. 18 App. 280 (1) (89 S. E. 451).

Contributory negligence: It can not be said that mother, in sending her six-year-old son unattended to a bakery to make a purchase, was guilty of such negligence as would prevent recovery

for his negligent killing by street car, where evidence disclosed that child was physically and mentally well developed and capable of performing such duty. 18 App. 314 (5) (89 S. E. 373).

Next friend: Suit against railway company for personal injuries to minor, brought by his mother as next friend, is not, either as to cause of action or as to parties, actually or substantially the same as a suit by the mother in her own right against the railway company for loss of minor's services. 20 App. 274 (1) (92 S. E. 1020).

Though divorced decree awards custody of minor child to mother, father may, as next friend, institute action against railroad company for negligent physical injury to child. 22 App. 192 (1) (95 S. E. 738).

Pleading: Allegations that solely by and through the negligence of defendant, its agents and employees, plaintiff was deprived of the services of her minor child, that on certain date such child sustained the loss of both legs through the carelessness and negligence of said defendant, and without the fault or contributing negligence of plaintiff, are too general. 20 App. 274 (2) (92 S. E. 1020).

Services: Basis of father's right of action is loss of services of child, and there can be no recovery where child was incapable of rendering services at time of its death. 15 App. 182 (82 S. E. 767).

§ 4413. (§ 3817.) **By wife, servant, etc.**

Automobile: Parent who kept automobile for comfort and pleasure of

her family, including minor son, is liable for negligence of son in driv-

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ing machine with her consent. 144/275 (1) (87 S. E. 10).

Employer of driver of automobile truck was not liable for death of child whom driver, acting without scope of duties, permitted to ride on running board of truck. 144/695 (87 S. E. 888).

Owner of automobile who is present in machine is liable for negligence of driver operating automobile for him. 14 App. 99 (2) (80 S. E. 212).

Where plaintiff's evidence showed that defendant owned automobile that injured him, and that chauffeur was defendant's servant, presumption arose that he was engaged in master's business. 16 App. 600 (1) (85 S. E. 930).

Where man had provided automobile for pleasure and convenience of his family, he is not responsible for tort of minor son committed when child is engaged merely in driving auto in pleasure and not in business of parent; petition here did not set forth cause of action. 17 App. 215 (1) (87 S. E. 713).

Negligence of chauffeur, in failing to avoid danger while driving his master in his automobile, is imputable to the master. 19 App. 193 (1) (91 S. E. 219).

Evidence here did not show that automobile that inflicted injury, and that was driven by unaccompanied minor daughter of one defendant, the father of the other defendant, owner of the car, was being operated with the knowledge or consent of either defendant, nor that it was being used in carrying on or aiding business of either defendant. 19 App. 484 (91 S. E. 786).

Owner of automobile is not liable for injuries inflicted by his son, twenty years of age, in negligently operating it, where it appears that at time of the injuries the son was using the car for his own purposes, and not as an agent or servant of the father. 21 App. 427 (1) (94 S. E. 636).

Trial judge, in action for injuries inflicted by defendant's son, twenty years of age, in operating defendant's automobile, did not err in directing verdict in favor of defendant, it appearing that such son was using the

car for his own purposes, and not as agent or servant of the father. 21 App. 427 (2) (94 S. E. 636).

Brakeman, upon either passenger or freight train, has implied power to remove trespassers therefrom. 18 App. 511 (1) (90 S. E. 80).

Charge: Where ownership of wagon inflicting personal injury, as well as connection of driver with defendant, could be inferred from circumstances and direct proof, court did not err in so charging. 17 App. 85 (2) (86 S. E. 96).

Charge that it was duty of defendant to comply with law, and to see that it was not violated by itself or its agents or servants, and defendant through its agents and servants must exercise ordinary care in carrying the law in effect, but if jury believed that defendant exercised ordinary care in efforts to enforce law, and, notwithstanding, plaintiff was in mill without its knowledge or consent, or knowledge or consent of its authorized agents, then defendant would not be liable, was not subject to exception that use of the words "agents or servants" extended defendant's liability to acts of others than authorized agents. 23 App. 605 (2) (99 S. E. 238).

Corporation: Mere fact that one who commits tort is director in corporation does not, without more, render corporation liable therefor. 141/565, 566 (4-a) (81 S. E. 886).

Manufacturing corporation was liable, in view of prescribed duties of watchman, for assault by latter on intoxicated person, though watchman was also special policeman. 143/593 (85 S. E. 747).

Where hospital was chartered as charitable institution, but nevertheless greater portion thereof was set aside for treatment of pay patients, one such patient who is injured by carelessness of employee may recover against such hospital, but recovery would be restricted to income derived from non-charitable sources. 148/438 (3) (96 S. E. 887).

Incorporated hospital, primarily maintained as charitable institution, is not liable for negligence of its officers and employees, unless it fails

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to exercise ordinary care in selection, or fails to exercise care in retaining such officers and employees, except as regards pay patients. 148/438 (4) (96 S. E. 887).

Where pay patient in incorporated hospital, primarily maintained as charitable institution, is injured on account of negligence or incompetence of officer or employee, petition need not allege that corporation failed to exercise ordinary care in selection of its officers and employees or in retaining same; judgment so recovered will not subject funds in trust for charitable purposes, unless petition alleges that corporation failed to exercise such care in the selection of such officers and employees. 148/438 (5) (96 S. E. 887).

Damages: Where testimony authorized finding of punitive damages, and evidence authorized recovery for amount claimed as actual damages, verdict including exemplary damages was not excessive. 16 App. 635 (3) (85 S. E. 932).

Where there was sufficient evidence to authorize submission to jury of plaintiff's right to recover for necessary expenses, such as reasonable physicians' bills incurred in consequence of injury to his minor daughter, and evidence sufficient to sustain verdict covering such element of damages, as well as loss of her services during minority, overruling defendant's motions for new trial was not error. 24 App. 290 (2) (100 S. E. 714).

Landlord: Notwithstanding allegations in action for damages caused by burning of house in consequence of burning of trash on farm by one of defendants that in preparing land for cultivation it became necessary to burn off certain trash, and that said defendant in carrying out his farming operations "put out" fire at different points on lands of his employer, co-defendant, and that these acts were within scope of business, no cause of action was set forth against the landlord as it did not appear that fire was set out under her express direction. 23 App. 284 (1) (98 S. E. 92).

Pleading: Petition alleging that a telephone company placed a large chest in a warehouse belonging to plaintiff's father, and left the lid open and that plaintiff, a child, was attracted thereby, and the lid fell upon and injured him, was not subject to general demurrer. 141/208 (1) (80 S. E. 788).

Where petition makes negligence of defendant's minor son proximate cause of injury, and alleges that tort was committed in prosecution of defendant's business, and petition does not show that plaintiff could have avoided injury, it was good as against general demurrer. 16 App. 642 (1) (85 S. E. 954).

Petition here in action against hotel company for damages on account of alleged conduct of servants and agents of defendant toward plaintiff while she was guest in its hotel, was not subject to demurrer interposed. 24 App. 533 (101 S. E. 713).

Petition alleging that defendant fair association let a concession, and that on refusal of concessionaire to change his location on order of defendant's manager, latter struck him with iron instrument and killed him, without provocation or justification, and wantonly and unlawfully, and within scope of employment, and to force deceased to change his location, not showing except by way of conclusion that it was done by defendant's command or assent or within scope of its business, was subject to general demurrer. 24 App. 707 (102 S. E. 32).

Proof: Evidence in action against a telegraph company, in which it was alleged that plaintiff was run over by a bicycle messenger boy in the service of the company, that plaintiff was struck by a boy on a wheel, that the boy had a blue uniform and a cap of such telegraph company, and that the witness did not know whether it was such company's bicycle or not, did not meet allegations of petition and was not sufficient to require submission of case to jury. 18 App. 775 (90 S. E. 730).

Scope of employment: Essential that employee shall have been acting within scope of his employment, in order to

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bind master for negligence or misconduct. 14 App. 403 (2) (81 S. E. 259).

Employer is liable for torts of servant done in prosecution and within scope of business. 17 App. 489 (2) (87 S. E. 714).

Whether agent was acting within scope of employment was for jury, in action for assault and battery, though at moment of assault he was under influence of personal anger. *Id.*

Allegation that defendant company's servant, unknown to plaintiff, started elevator, causing injury complained of, must be taken to mean that such servant was defendant's servant in thus operating the elevator, and that consequently the act was within scope of his authority, it being further charged that defendant was negligent in that it caused or allowed the elevator to be thus moved by its

servant. 24 App. 478, 479 (3) (101 S. E. 311).

"**Servant**" includes employee in charge of vehicle, negligent operation of which causes injury to another. 14 App. 234 (3) (80 S. E. 661).

Vehicle: Where eight-year-old boy caught his foot in wheel of tricycle and while attempting to extricate himself was run over by wagon driven rapidly down street by defendant's servant without looking ahead, defendant is liable for boy's injuries. 14 App. 234 (1) (80 S. E. 661).

Wilful: Where plaintiff and railroad porter were lifting trunk, plaintiff's position at one end of trunk was not so obviously perilous to porter as to charge railroad company with wilful negligence because porter permitted his end to fall. 16 App. 673 (2) (85 S. E. 974).

§ 4414. (§ 3818.) By employee.

Automobile: Where owner of automobile delivers it to mechanic for repairs, and surrenders control, mechanic is not servant of owner, but independent contractor; and where mechanic negligently and in violation of ordinance injures another while testing car, owner is not liable in damages; fact that owner's driver was riding in car at time of injury does not alter rule. 19 App. 797 (1) (92 S. E. 295).

Where, in suit against owner of automobile for personal injuries, evidence of plaintiff showed, without contradiction, that automobile, at time it struck him, was being driven by one not in employ of owner, and who was driving it without knowledge of owner, court did not err in granting nonsuit. 19 App. 799 (92 S. E. 295).

§ 4415. (§ 3819.) Employer, when liable for acts of contractor.

5.

Applied. 17 App. 217 (1) (86 S. E. 429).

Acceptance: Where employer accepts work so constructed by independent contractor as to amount to nuisance he becomes responsible for the nuisance. 143/206, 207 (2) (84 S. E. 451).

Where it appeared that chauffeur was operating car contrary to express direction of his master, defendant in suit for injuries, and not in connection with any business of such master, but wholly for his own private use and purposes, trial judge did not err in directing verdict in favor of the master. 20 App. 242 (92 S. E. 965).

Railroad: To render employer liable for act of employee on its switch engine, in striking and knocking from engine to the track his subordinate, who was run over and killed, it must clearly appear not only that act was done in prosecution of employer's business, but also that it was done within scope of doer's employment and was not prompted solely or primarily by malice. 20 App. 546 (94 S. E. 175).

Charge of this section was clearly inapplicable under evidence and should not have been given. 143/206 (1-c) (84 S. E. 451).

Interference: Independent contractor and his employees become employees of owner by interference of owner

Torts; general principles, and herein of fraud and deceit.

with method or means of doing the work, resulting in injury to employee of contractor. 261 Fed. 279, 280 (5).

Employer is liable if he so interferes with or assumes control over work being done by independent contractor as to create relation of master and servant. 24 App. 445 (2) (101 S. E. 300).

Interference or assumption of control does not necessarily create relation of master and servant, but it is sufficient to make employer liable if

6.

Charge: Application of this section should have been limited to injuries from interference with flowage of

it is such "that an injury results which is traceable to his interference." 24 App. 445 (3) (101 S. E. 300).

Municipal ordinance: Obligations imposed by building ordinances of City of Atlanta are not imposed by its terms on contractor and owner jointly, but, where they are acting independently, are imposed, each only according to degree of control either may exercise. 17 App. 217 (2) (86 S. E. 429).

water causing it to damage plaintiff's land. 143/206, 207 (2) (84 S. E. 451).

General Note.

Charge of provisions of this section which were not applicable under the evidence were improperly charged in action for injury to land. 143/206 (1) (84 S. E. 451).

Damages: Instruction on measure of damages was erroneous here for failure to require jury to segregate damages for which defendant was respon-

sible from those chargeable solely to negligence of independent contractor. 143/206, 207 (3) (84 S. E. 451).

Pleading: Petition, in action against owner of building for death of plaintiff's husband while in employ of contractor, held demurrable. 17 App. 217 (3) (86 S. E. 429).

§ 4416. (§ 3820.) **Ratification of torts.**

Father of infant son, who had negligently injured another, did not, by his expressions of sympathy to the bereaved family and his statements to mother of the deceased that he would do the right thing by her, ratify the tort or acknowledge his liability therefor. 21 App. 427, 430 (94 S. E. 636).

Landlord: Allegations in petition for

damages on account of burning of house on plaintiff's land in consequence of burning of trash on farm by a cropper that defendant landlord failed to discharge said cropper, and admitted liability for injury caused by him, and offered to pay damages, did not show ratification of unauthorized acts of cropper. 23 App. 284 (1) (98 S. E. 92).

§ 4417. (§ 3821.) **Vicious animals.**

Volunteer: Mere volunteer assumed any risk from vicious character of

animal causing his injury. 14 App. 287 (2) (80 S. E. 693).

§ 4418. (§ 3822.) **Dogs, owner liable for.**

Evidence here authorized finding that killing of plaintiff's dog was wanton and malicious. 16 App. 254 (85 S. E. 200).

Property: Owner of dog which is wantonly, maliciously, or intentionally killed by another may recover therefor. 16 App. 254 (85 S. E. 200).

§ 4419. (§ 3823.) **Frauds by acts or silence.**

Creditors: Agreement between two creditors of insolvent estate to bid upon,

and, if necessary, to buy and own in equal proportion the property of the

Torts; general principles, and herein of fraud and deceit.

estate, for purpose of causing property to bring its fair market value, will not estop one of the creditors from claiming prior lien upon property expressly excluded from terms of agreement, although creditor asserting lien failed to advise other creditors of its existence. 20 App. 1 (1) (92 S. E. 778).

Equitable interest: Wife having equitable title to land to which deed is taken in husband's name, estopped from asserting title as against lien of judgment creditor, though before such judgment the husband, in recognition of the equity, may have conveyed the land to her. 140/670 (3) (79 S. E. 576).

Injury: Remaindermen suing bank and its president on ground that they conspired to defraud by fraudulently encumbering certain property can not recover where they had purchased the

land, as they were not injured by depreciation in price because of such incumbrance. 144/519, 520 (3) (87 S. E. 661).

Estoppels are not favored, and mere silence will not work an estoppel unless circumstances are such as not only to afford an opportunity to speak, but also to create an apparent or actual duty to speak; he who invokes an estoppel must have changed his position, to his injury, upon strength of facts upon which claim of estoppel is based. 20 App. 1 (2) (92 S. E. 778).

Title: Claimant was estopped from asserting his title to land as against plaintiff in *f. fa.* by reason of representations made to grantee in security deed at time of its execution, to effect that grantor owned the land, whereby grantee was induced to sell property on credit to grantor. 147/27 (2) (92 S. E. 536).

§ 4420. (§ 3824.) Owner bound to keep premises safe, when.

Child: See **Trespasser.**

Electricity: Petition in action for injuries from electric shock received while in defendant's building on business held not subject to general demurrer. 144/124 (1) (86 S. E. 319).

Where petition against owner of house supplied with electricity by uninsulated wire, by which plaintiff was injured when he fell and came in contact with it by walking along adjacent woodland lot not owned by defendant, alleged negligence as to sagging and uninsulated condition, but did not allege any invitation to use paths, or that its character amounted to an invitation or permission, or to show that injury resulted from its use in exercise of such commission, general demurrer was properly sustained. 24 App. 232 (100 S. E. 639).

Invitees: Petition here for damages for personal injuries predicated recovery on defendant's duty to plaintiff because he was on defendant's premises by invitation on matter of business in which defendant was interested. 143/596 (1) (85 S. E. 755).

Evidence here did not support allegations of petition that plaintiff was on defendant's premises by invitation

on business in which defendant was interested. *Id.* 596, 597 (2).

Landlord: Where owner of land has fully parted with both possession and right of possession by any lawful contract of rental, his liabilities are those prescribed by section 2694; in such case this section is without application, but it is otherwise where the possession or the right of possession is not fully parted with. 21 App. 246 (1) (94 S. E. 252).

Licensee: Where undisputed evidence showed that plaintiff entered office building to see a tenant on business of her own, she was a licensee only, and was not there by the invitation, express or implied, of the owner of the building, and trial judge did not err in granting nonsuit. 22 App. 177 (97 S. E. 112).

Petition alleging that defendant's railroad velocipede, placed near depot, where small children were permitted to go, was negligently left so that it might be moved, and that child, attracted thereby and not appreciating the danger, caught his hand in the gearing and was injured, was not subject to general demurrer. 24 App. 790 (102 S. E. 464).

Torts; general principles, and herein of fraud and deceit.

Master: In order for doctrine of respondeat superior to have application, it must appear that alleged negligent act of defendant's servant occurred while he was acting as such servant and within scope of his employment. 24 App. 478, 479 (1, 2) (101 S. E. 311).

"Owner," as used in this section, is not synonymous with "landlord," as used in section 3694. 21 App. 246 (1) (94 S. E. 252).

Petition in action against owner of building, prospective tenant thereof, and contractor employed to make certain alterations therein alleging that owner retained possession and control of the building, that the contractor and prospective tenant each severally requested petitioner to go to the building and there to make an estimate of cost of certain work, that petitioner went to the building for purpose of making estimate and fell into hole which defendants negligently failed to guard, etc., failed to show breach of any duty which contractor owed petitioner and was demurrable. 23 App. 465 (98 S. E. 359).

Trespasser: Where, in an action for injuries to a minor child by negligence in leaving dangerous appliances on certain premises, it appeared that both parties were lawfully on the premises, the rule in reference to liability of an owner or occupant of the property to a trespasser does not control. 141/208, 209 (2) (80 S. E. 788).

Where evidence showed that plaintiff went as volunteer or intruder on that part of defendant's premises where he received electric shock, error to charge on plaintiff's right to recover on theory that he was invitee or licensee. 144/124 (3) (86 S. E. 319).

§ 4421. (§ 3825.) **Action for tort does not abate by death of either party.**

Construction: This section must be strictly construed. 14 App. 386 (1) (80 S. E. 862).

Federal Employer's Liability Act: Action under the Federal employer's liability act does not abate upon death

Operator of cottonseed oil mill was not liable for injury to child on ground that it kept doors of seed-house open, making the place attractive to children. 145/130 (88 S. E. 672).

Heavy two-wheeled truck for moving freight in depot was not so attractive as a plaything for children and so dangerous in its nature as to come within rule of "turn-table cases," and railway company was not liable for leaving it accessible to child who was in habit of playing at depot and who was injured by it. 20 App. 291 (93 S. E. 29).

Duty to trespasser arises only with knowledge of the perilous position of the trespasser, and is, therefore, not to anticipate, but to refrain from wanton or willful injury after knowledge of trespasser's peril; failure to exercise ordinary care and diligence is in many instances equivalent of wantonness and willfulness, but, manifestly, only after perilous position of trespasser is known. 20 App. 645 (93 S. E. 306).

Petition alleging that plaintiff, a child, was injured in courthouse square belonging to county, by fall of iron shaft on which he was playing, that it was placed there by city authorities, who under agreement with county commissioners had charge of such square, that for years many people had frequented the square at place where injury occurred, that shaft was alluring and attractive to children, that it was not braced and slight pressure was likely to cause it to fall, and that city had notice of these facts, was not demurrable. 23 App. 241 (98 S. E. 91).

of plaintiff. 24 App. 532 (3) (101 S. E. 710).

Pending suits: This section does not authorize maintenance of suit brought by administrator of R. for injury to R.'s horse while R. was alive, sec-

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tion referring to pending suits only.
17 App. 437 (87 S. E. 754).

Personal injuries: Personal injury action
against railroad under state law does

not abate upon death of plaintiff, but
survives to his personal representa-
tive. 24 App. 532 (3) (101 S. E. 710).

CHAPTER 2.

Of Injuries to the Person.

ARTICLE 1.

Physical Injuries.

§ 4422. (§ 3826.) Physical injuries.

Act of God: Where, in action for personal injuries, there was neither pleading nor proof that electrical disturbance mentioned in defendant's answer was so extraordinary and unprecedented as to come within meaning of an act of God against which defendant was not required to guard, court did not err in refusing to charge jury that an act of God would relieve defendant from liability. 21 App. 442, 443 (3) (94 S. E. 637).

Assault and battery: Where evidence showed unprovoked assault and battery it was error to charge that plaintiff could not recover if defendant was justified under some rule of law. 143/35 (1) (84 S. E. 127).

Charge that damages recoverable are what law calls direct and general damages was not erroneous. *Id.* 35 (3).

Verdict for plaintiff for nominal damages only is unauthorized where uncontradicted evidence shows that he suffered substantial injury. *Id.* 35 (4).

Automobile: Petition here in action for personal injuries from collision of defendant's automobile with plaintiff's bicycle set out cause of action, and court erred in sustaining general demurrer. 24 App. 48 (99 S. E. 707).

Charge here, that if plaintiff's contention in case is correct, and she believed that diamonds she had left in defendant's store were not the ones that were returned to her, she had a right to go to defendant's place of business and ask them, in a proper manner, if it were possible that a

mistake had occurred, and that if she did no more they could not order her from the store, held not erroneous, viewed in light of entire charge to jury. 23 App. 33 (6) (97 S. E. 277).

Where defendants were sued as joint tort-feasors, and evidence showed conclusively that if there was any liability they were liable jointly, charge that if jury found for plaintiff she would have a right to recover against both defendants, and if they found that she was not entitled to recover, the form of verdict would be, "We, the jury, find for the defendants," if error, was harmless. 23 App. 33, 34 (8) (97 S. E. 277).

Damages: Recovery of damages which can not legally be measured by any other standard than the enlightened conscience of impartial jurors can not be set aside on the ground that it is excessive, unless it is manifestly the result of prejudice, bias, or corrupt motive. 13 App. 100 (1) (78 S. E. 830).

Where petition shows clearly that plaintiff sued for unprovoked assault and battery, praying compensation for injuries inflicted, and, by reason of certain alleged aggravating circumstances, asked for punitive or exemplary damages, exception that verdict is contrary to law because plaintiff seeks to recover for only mental pain and suffering, and not for any physical injury is without merit. 23 App. 33 (2) (97 S. E. 277).

Electric wires: Where electric-light company maintains overhead wires

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to supply light to residence it must employ such approved apparatus as is reasonably necessary to prevent injury from electricity generated by thunder storm. Petition here was not demurrable for failure to state cause of action. 142/677 (83 S. E. 529).

Where defendant was alleged to have been negligent in failing to maintain proper insulation on wires conveying electricity, and in failing to provide transformer of sufficient capacity to reduce properly the current passing through it, charge to effect that defendant was bound to provide such safeguards against danger as are best known and most extensively used was not harmful to defendant and did not require reversal. 21 App. 442 (2) (94 S. E. 637).

Electric company which maintains over and across wires of telegraph company, or in close proximity thereto, wire carrying dangerous current, must use ordinary care in maintaining its poles and wires so as to permit telegraph company's employees ascending telegraph pole to perform work with reasonable safety. 24 App. 390 (1) (100 S. E. 800).

Employee of telegraph company ascending telegraph pole in course of his duties, while in exercise of ordinary care for his own safety, may assume that electric company's wire over and across telegraph wires, or in close proximity thereto, and carrying dangerous current, are properly placed and insulated so as to render them reasonably safe. 24 App. 390 (1) (100 S. E. 800).

Where plaintiff employee of telegraph company alleged in his action for personal injury that he did not know, and could not by ordinary care have discovered, danger from wire of defendant electric company, further allegations that he did not and could not know that his master had furnished him unsafe place to work, and did not have equal means with master of discovering place was dangerous, or had been rendered dangerous, for work, were immaterial and irrelevant, where by amendment plaintiff had stricken his master as party defend-

ant. 24 App. 390, 391 (4) (100 S. E. 800).

Petition in action by telegraph company's employee against electric company for injury from wire carrying dangerous current, alleging failure to warn him of position of electric wire, that wire was closer to telegraph wires than permitted by telegraph company's known rules, failure to inspect uninsulated condition, etc., was not demurrable on various grounds stated. 24 App. 390, 391 (4) (100 S. E. 800).

Evidence: It was not error to admit evidence as to present apparent difference between right and left sides of plaintiff's face, where witness further testified that he knew plaintiff before the injury and that both sides of his face were then uniform. 18 App. 673, 674 (4) (90 S. E. 364).

Evidence here warranted finding that defendant was negligent in driving his automobile past plaintiff's buggy, which was standing still, hitting same and throwing plaintiff out and injuring him as alleged in petition. 19 App. 558 (1) (91 S. E. 999).

Evidence here in action against railway company, telegraph company, and telephone company for injuries caused by stumbling over wires which had been blown down held to disclose liability on part of first two but not on the telephone company. 23 App. 169 (2) (98 S. E. 116).

Explosives: Petition here in action for injuries to child from dynamite caps left on vacant lot by agents of defendant, the owner of the lot, stated cause of action. 143/236 (1) (84 S. E. 450).

Jury: Generally, negligence is a question of fact to be determined by the jury. 13 App. 124 (2) (78 S. E. 944).

Loose paper: Act of leaving loose paper at place from which it is blown into street causing horses to run away and injure the driver, may be negligence as matter of fact. 141/721 (1) (82 S. E. 23).

Violation of a sanitary ordinance requiring merchants to confine papers in garbage cans is not negligence per se as to person driving along street

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and injured by his horses becoming frightened at loose paper. *Id.*

Petition here in action for injuries from horses becoming frightened at paper blown into street from where it had been negligently placed by defendant held not subject to general demurrer. *Id.*

Where a merchant negligently left loose paper at place from which it was blown into street and frightened team of horses, he could not avoid liability from resulting injuries by contending that blowing of wind was proximate cause, where wind was not unforeseen or of such character as to be act of God. *Id.* 721, 722 (2).

Negligence: Failure to prove nonessential allegations of negligence did not require reversal, where necessary allegations were supported by evidence. 17 App. 487 (2) (87 S. E. 720).

Negligence is failure to use that degree of care which it was duty to use under circumstances. 145/696, 697 (2-c) (89 S. E. 753).

Nonsuit: Where evidence sustained

petition alleging that while plaintiff was passing along a certain street, and while in the exercise of due care, she was struck and injured by a buggy driven by defendant, through his negligence in driving at too high rate of speed, it was error to grant nonsuit at conclusion of plaintiff's testimony. 141/97 (80 S. E. 553).

Partial disability: Where defendant denied plaintiff's allegation that he was totally disabled, evidence of partial disability was admissible. 17 App. 702 (3) (87 S. E. 1093).

Saw: Where failure of defendant to furnish saw in reasonably good condition and failure to warn injured party of any defects, etc., was proximate cause of injury, plaintiff could recover, unless injury was due to his failure to exercise care, or he could have avoided consequences of other's negligence. 14 App. 233 (1) (80 S. E. 535).

Voluntary intoxication is not per se negligence. 145/696 (2) (89 S. E. 753).

§ 4424. (§ 3828.) Recovery for homicide, when.

Stated. 144/62 (1) (86 S. E. 248).

Amendment: Proffered amendment to petition, alleging that plaintiff was widowed mother of deceased, and at time of his homicide was in ill health and unable to earn a living, and was entirely dependent on deceased for support, and that defendant willfully and wantonly ran its train over and killed deceased after knowing that he was upon their tracks, was erroneously refused. 18 App. 159 (88 S. E. 995).

Charge in action for death of child that jury should consider what would be expense of father for maintenance, protection, and education of child was not prejudicial to defendant. 143/753, 754 (4) (85 S. E. 920).

Charge on right of wife to recover for negligent homicide of her husband, and extent of her recovery, was not objectionable as not stating that negligence must be that of defendant, where jury could not have been misled. 144/481 (3) (87 S. E. 388).

Charge on earning capacity of deceased and his expectancy, in action under Civil Code of South Carolina

1902, sections 2851, 2852, for death, held not erroneous. 13 App. 799 (7) (81 S. E. 269).

Charge that plaintiff, if dependent on deceased, could recover full value of his life, was erroneous, as taking from jury defense of contributory negligence. 17 App. 629 (5) (87 S. E. 909).

Child: Under Tennessee statute giving right of action for wrongful homicide, widow of deceased alone had right to sue in first instance, and children have right only where there is no widow. 141/558 (81 S. E. 867).

Requested instruction in action for death of child that unless it is shown what is the age and probable expectancy as to life of child, then plaintiff can not recover, was proper in suit for services lost and burial expenses, of which there was evidence. 143/753, 754 (5) (85 S. E. 920).

Demurrer raising issue that petition in action for death of plaintiff's son failed to show any right of plaintiff to sue because not conforming to section 2782 was properly overruled,

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where it appeared that suit was brought under this section. 17 App. 617 (1) (87 S. E. 920).

Minor children residing with father can not maintain independent and separate suit for negligent homicide of their mother. 19 App. 662 (1) (91 S. E. 1070).

Failure and refusal of husband and father to join in suit with children for negligent homicide of mother will not authorize separate suit by children. 19 App. 662 (2) (91 S. E. 1070).

See **Grandmother, Mother, Parent.**

Conflict: This section is in conflict with section 2782, which, being a later expression, controls. 142/696 (1) (83 S. E. 525).

Conspiracy: Petition alleging that defendants, in pursuance of conspiracy to cause death of plaintiff's husband, wrote him a letter demanding his resignation from certain official position, and that, owing to the nervous condition of decedent, such letter caused him to take a drug which caused his death, and that defendant knew that such letter would produce such effect, demurrable. 140/680 (79 S. E. 564).

Dependent: Evidence here in action by mother for death of minor son showed that she was partially dependent upon and supported by proceeds of his labor, though he had taken new employment so recently that he had no opportunity to contribute to her support from wages thereof. 17 App. 625, 627 (4) (87 S. E. 923).

Earning capacity: Diminished earning capacity of injured employee from date of injury to date of his majority was matter which concerned his father, earnings in that interval belonging to father and not to child. 144/716, 717 (3) (87 S. E. 1029).

Reasonably probable earning capacity of deceased may be determined from evidence of past earnings, considering age and probable future increase in efficiency, as well as natural diminution therein from old age. 15 App. 571, 572 (8) (84 S. E. 69).

In estimating value of ordinary domestic services rendered by wife, jury is authorized to consider what may be value of many services incapable of exact proof. Id. 572 (9).

Jury may consider value of ordinary domestic services from their own observation and experience. Id.

Electric wires: Petition here in suit against city for death caused by coming in contact with electric wires construed and held to state a cause of action. 140/614, 615 (1) (79 S. E. 469).

Defendant's negligence could be inferred from mere happening of accident. Id. 625, 626 (2-a).

That there was defect in lamp did not preclude recovery, where it appeared that defendant's negligence was proximate cause of homicide. Id. 625, 626 (2-b).

Liability of telephone company for death due to dangerous condition of its wires charged with electricity, depends on whether its employees at time of accident were using that ordinary care and diligence which prudent man would use under similar circumstances to ascertain and remedy defective condition. 16 App. 864 (4) (87 S. E. 766).

Former telephone subscriber, who was killed from contact with disconnected wire charged with electricity, owed no duty to inform telephone company of dangerous condition of wire. Id.

Petition here in action for death due to negligently permitting dangerous electric current of high voltage to pass to secondary wires intended only for low voltage current stated cause of action. 17 App. 625 (1) (87 S. E. 923).

Evidence here authorized finding that death was due to high voltage current being negligently permitted to pass through secondary wires intended only for low voltage current, it appearing that decedent was killed when he caught hold of tin reflector attached to incandescent light. Id. 625, 626 (2).

Recovery could not be had for death caused by uninsulated wire, with which decedent came in contact in moving building, where city did not give permission to move such building. 145/161 (88 S. E. 923).

Evidence: Admission of evidence that decedent was sole support of widow

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and her children was harmful error. 142/536 (2) (83 S. E. 117).

Evidence in action by widow for death of husband, that deceased had been twice married, and that at time of suit three minor children by former marriage were living was admissible. 144/758 (1) (87 S. E. 1067).

Evidence here in action for injuries sustained in automobile collision did not support verdict for plaintiff. 24 App. 785 (6) (102 S. E. 360).

Grandmother: A grandmother who accepted the gift of a grandchild from the mother with the consent of the father, and raised such child until at the age of 17 it was killed, is entitled to recover the value of the child's services until majority, though the gift of the child occurred before the passage of section 3021. 13 App. 781 (1) (80 S. E. 29).

Interest: Jury may increase damages awarded by including legal interest on present cash value of life of deceased from death to date of verdict. 15 App. 571, 572 (7) (84 S. E. 69).

In determining amount of recovery jury may include interest from date of death to rendition of verdict. 17 App. 625, 627 (3) (87 S. E. 923).

Intoxication: Petition here in action for death of plaintiff's son from overturning of automobile, due to defendant's intoxication, was not demurrable, there being nothing to show that decedent was aware of defendant's intoxicated condition. 143/59 (84 S. E. 121).

Jury: Question whether infant was capable of rendering valuable services to its parent was for jury where infant was more than two years old. 15 App. 182 (82 S. E. 767).

Life expectancy: Jury, on proof of injured person's age and earning capacity, may estimate value of life and reduce that value to present cash value by any method which produces definite and fair result. 15 App. 571, 572 (5) (84 S. E. 69).

Measure of damages: In determining amount of recovery jury may consider decedent's previous earning capacity, health, probability of increase and decrease of earning capacity, and quali-

ties likely to affect same. 17 App. 625, 627 (3) (87 S. E. 923).

Parent is entitled to recover present cash value of services of minor child, negligently killed, without deduction for usual and reasonable expenses of caring for and rearing such child to its majority, and amount of damages can be arrived at from consideration of evidence, or from experience and knowledge of human affairs on part of jury. 18 App. 314 (3) (89 S. E. 373).

Court did not err in not instructing jury that they must determine reasonable expense of caring for and rearing deceased minor child, and deduct this sum from any amount they found as damages. 18 App. 314 (4) (89 S. E. 373).

Mother of deceased, if she was entitled to recover at all, was entitled to recover full value of life of deceased as shown by the evidence. 20 App. 246 (1) (92 S. E. 947).

Where liability for death of minor child is shown, the father, who is entitled to services of such child, may recover for loss of such services, upon proof that child was possessed of ability and capacity to render valuable services, and it is not necessary to show that the child actually rendered such services. 20 App. 648 (2) (93 S. E. 240).

In estimating value of ordinary domestic service rendered by a wife, jury may take into consideration what may be value of many services incapable of exact proof, but measured in light of their own observation and experience. 22 App. 313, 314 (2) 96 S. E. 17).

Where there is nothing in the record to suggest bias or prejudice on part of jury, verdict can not be set aside as excessive where amount thereof could have been arrived at under proof submitted, taking into consideration that deceased was a wife and mother. 22 App. 313, 314 (2) (96 S. E. 17).

Where court expressly charged jury that in estimating present cash value of life of deceased, they should diminish or decrease figures used in mortality table, in accordance with facts in case under investigation, and

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further expressly called attention to diminished capacity to earn money resulting from advancing years, and directed jury to be governed by the facts and circumstances as proved, feebleness of health, actual sickness, and loss of employment, voluntarily abstaining from work, etc., and directed jury to make proper allowance for any diminution in earning capacity resulting from any of such causes, no merit existed in assignment of error to another charge on measure of damages. 22 App. 313, 315 (5) (96 S. E. 17).

Where charge relative to method of computation in reducing gross earning capacity of a decedent to its present worth is conceded by counsel of both parties to have furnished no rule or guide by which amount of particular verdict or verdict in any amount could have been arrived at, it must be taken as meaningless and harmless. 23 App. 347 (9) (98 S. E. 248).

Mother: Allegation that plaintiff was partially dependent on child for support and that child was then contributing to her support sufficiently pleaded, as against general demurrer, the mother's right to recover. 142/715 (1) (83 S. E. 670).

Where father, mother, and minor children residing together are mutually dependent on labor of family, minor child, proceeds of whose labor comes into common stock for entire family, contributes to mother's support so as to give her right of action for his wrongful death. 17 App. 625, 627 (4) (87 S. E. 923).

To entitle mother to right of action it is sufficient that she shall have been partially dependent on and supported by child's labor. *Id.*

Mother may recover for death of minor child to whom she was wholly or partially dependent and who contributed to her support, though father is living with family and in good health. *Id.*

Construction of this section as giving right of action to mother, if there was partial dependency on contribution, and even though child's earnings are legally due father, is binding

on Federal courts. 268 Fed. 278, 279 (7).

Petition here, as amended, in suit by mother for homicide of son, set forth cause of action as against general demurrer. 18 App. 159 (88 S. E. 995).

Fact that mother of six year old boy sent him unattended to make purchase for her, and that while performing this duty he was killed by street car, by reason of negligence of incompetent servant of railway company operating it, can in no way affect mother's right to recover present cash value of services of son until his majority. 18 App. 314 (5) (89 S. E. 373).

In order for mother to recover for negligent homicide of minor son, it must appear both at time of homicide she was dependent upon child and that child contributed substantially to her support; degree of dependence may be either total or partial, and contribution by child may be either in part or in full support of mother. 19 App. 691 (1) (91 S. E. 1068).

Mother who is dependent on minor child who contributed substantially to her support may recover for child's negligent homicide notwithstanding father be in life and in such state of health as to enable him to perform labor. 19 App. 691 (2) (91 S. E. 1068).

Contribution by minor child to mother may be either in labor or in money, or both. 19 App. 691 (2) (91 S. E. 1068).

If father, mother, and minor son reside together and are mutually dependent upon labor of family for support, minor son, who, by his labor or his proceeds, aids in support of family, is to be considered as contributing substantially to support of mother. 19 App. 691 (3) (91 S. E. 1068).

Negligence: Where defendant in action by widow for criminal killing of husband pleaded self-defense, question whether deceased exercised ordinary care to avoid defendant's negligence was not in issue to be charged upon. 144/62 (2) (86 S. E. 248).

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Right of wife to recover for death of husband killed by coming in contact with telephone wires charged with electricity depended on his conduct at time of death, in view of his knowledge of conditions of wire. *Id.*

Nonsuit: Where, in suit for negligent homicide of plaintiff's son, plaintiff's evidence, together with admissions in defendant's answer, failed to show that homicide was caused by defendant's negligence, nonsuit was properly awarded. 19 App. 268 (91 S. E. 280).

Parent: If child is capable of rendering services of value when it is wrongfully killed action may be maintained for loss of services during remainder of minority. 143/753 (3) (85 S. E. 920).

Action for death of railroad employee can not be brought by decedent's father and mother jointly against another than employing road whose negligence concurred in causing injury. 144/737, 739 (2) (87 S. E. 1082).

See **Child**.

Passion: Charge that killing must be result of sudden, violent impulse of passion supposed to be irresistible was not objectionable here, in view of entire charge, for failure to charge that jurors were judges of cooling time. 144/758, 759 (4) (87 S. E. 1067).

Presumption: Conclusively presumed that infant less than two years old was incapable of performing services of value to its parent. 15 App. 182 (82 S. E. 767).

Proximate cause: One may be liable for injury resulting from his negligence, though he could not have reasonably anticipated particular injury or that particular person would be injured. 16 App. 686 (6) (85 S. E. 978).

Release: Where person injured voluntarily settled with defendant, and executed release discharging defendant from all liability, verdict for defendant in action by widow of injured person was demanded. 145/516 (1) (89 S. E. 488).

Threats: Where, in action of death of plaintiff's husband, there was evidence that deceased was aggressor, evidence of uncommunicated threats by him toward defendant was admissible

to show his animus and intent. 144/758, 759 (2) (87 S. E. 1067).

Widow: Where separate actions were instituted in city court by two women against railroad company, for homicide of employee, each plaintiff alleging relationship as widow to deceased, court did not err, in equitable suit by railroad company, in refusing to enjoin such suits and to compel plaintiffs to intervene in equity suit to determine which, if either, was widow of deceased, with right in company to contest rights of both, and if neither was shown to be the widow that both be enjoined from prosecuting their suits, but if one should be widow, that her suit be allowed to proceed. 146/488 (91 S. E. 555).

Suit by widow to recover for negligent homicide of her husband must be brought within two years from accrual of right of action. 20 App. 251 (2) (92 S. E. 1025).

Where widow sues for homicide of husband, and defendant admits killing and seeks to justify it by pleading debauchery of his daughter by deceased, but fails to set up facts or circumstances showing such an urgent and pressing danger of a new act of adultery as to make the killing absolutely necessary in order to prevent the new act, it is not error to strike the plea, or demurrer thereto by plaintiff. 21 App. 537 (1) (94 S. E. 862).

Where plaintiff in action for homicide of her husband proved her case as laid in her petition, and defendant's answer and testimony demanded finding by jury that he had feloniously killed the husband, court properly instructed jury that sole issue for determination was value of life of deceased, following such direction with instructions as to method of arriving at amount of plaintiff's recovery. 21 App. 537 (3) (94 S. E. 862).

Petition here in action for damages resulting from personal injuries to plaintiff's husband which caused his death, was not subject to demurrers interposed. 24 App. 118 (99 S. E. 798).

Injuries to the person; physical injuries.

§ 4426. (§ 3830.) **Diligence of plaintiff.**

Cited and applied. 13 App. 293, 295 (79 S. E. 88), 799, 816 (81 S. E. 269); 16 App. 196, 202 (84 S. E. 976); 17 App. 10, 25, 28 (86 S. E. 260); 23 App. 224 (1) (97 S. E. 860).

Stated. 16 App. 1 (1) (84 S. E. 209).

Apparent: One can not recover for negligence of another, the consequences of which he could have avoided by exercise of ordinary care after negligence became apparent, or should reasonably have been apprehended. 13 App. 124 (2) (78 S. E. 944).

Duty to exercise ordinary care to avoid consequences of another's negligence, does not arise until negligence of latter is existing and is apparent or circumstances are such that ordinarily prudent person would have reason to apprehend its existence. 15 App. 93 (1) (82 S. E. 665).

Apportionment of damages: If minor, employed in violation of section 3149 (a), is not guilty of such negligence as will prevent recovery, but is guilty of some negligence, doctrine of diminution of damages may be invoked. 140/727 (4-a) (79 S. E. 836).

Doctrine of comparative negligence and apportionment of damages does not apply, where contributory negligence of injured person was sole cause of injury, or where by ordinary care he could have avoided injury. 142/513 (4) (83 S. E. 127).

Where injury was primarily due to negligence of defendant, right of plaintiff is not defeated, even though but for the concurring negligence the injury might not have resulted; plaintiff's recovery should be diminished in proportion to the degree in which his negligence contributed to the injury. 13 App. 220, 230 (80 S. E. 36).

Evidence showing negligence on part of automobile driver who was injured and on part of railroad company, error to refuse to charge that if both parties were negligent, or negligent, plaintiff can not recover of defendant, or equalled it, then plaintiff could not recover. 13 App. 477, 478 (4) (79 S. E. 378).

Where deceased was contributorily negligent, plaintiff cannot recover full value of life of deceased, but this amount should be reduced proportionately to default attributable to deceased. 17 App. 629 (5) (87 S. E. 909).

Verdict for \$2,000 against railroad company for loss of a leg and other minor personal injuries sustained. 18 App. 134, 135 (5) (88 S. E. 919).

Doctrine of contributory negligence is not law of this State; doctrine which obtains is that of comparative negligence. 19 App. 413, 417 (91 S. E. 517).

Charge that if plaintiff was injured on account of defendant's fault or negligence, he could recover, and if both plaintiff and defendant were at fault, and plaintiff could not have avoided consequences to himself of defendant's negligence by exercise of ordinary care, plaintiff might recover, but damages should be diminished by jury in proportion to amount of default attributable to him, was not error. 22 App. 155, 156 (1-e) (95 S. E. 765).

Failure to charge that if plaintiff was guilty of some negligence, but not of such negligence as would prevent recovery, defendant would be entitled to diminution of damages was not error, where there was no plea of contributory negligence and no request so to charge. 23 App. 605 (3) (99 S. E. 238).

Where court fully and fairly instructed jury upon law relative to reduction in damages by reason of contributory negligence on part of plaintiff, it was not error to fail to again instruct in this connection when charging upon plaintiff's right to recover for pain and suffering. 24 App. 175 (1) (100 S. E. 231).

Automobile: Charge that if jury found that plaintiff did not have automobile under control, or was operating it at rate of speed greater than six miles per hour, at time he approached railroad crossing then in either event he would not be in exercise of ordinary care for his safety and would not be entitled to recover, was not er-

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roneously refused. 146/206 (1) (91 S. E. 29).

Charge that if plaintiff, in operation of automobile, did not exercise ordinary care, he could not recover, was qualified by charge following, to effect that want of such care on part of plaintiff would defeat recovery if it was direct and proximate cause of injury; and charge was not subject to exception that court did not instruct that failure to exercise ordinary care on part of plaintiff must have been cause of injury. 18 App. 592 (2) (90 S. E. 92).

Avoid: Where person killed by running of train could by exercise of ordinary care have avoided consequences of defendant's negligence after it came into existence and was known to him or could have been discovered by exercise of ordinary care, action will not lie. 145/792, 793 (5) (89 S. E. 841).

Bridge: Where, even if county was negligent in failing to erect and maintain guard rails on approach to bridge on which plaintiff's husband was driving his mules and wagon when they fell into creek and he received injury that caused his death, it appears, from allegations of petition, that the husband could by ordinary care have avoided consequences to himself caused by negligence complained of, court did not err in dismissing petition on general demurrer. 18 App. 769 (90 S. E. 725).

Petition which showed that plaintiff knew of defect in bridge, or in its earthen abutment forming part thereof, and that there was some danger in driving over it, was not subject to general demurrer, unless it appeared that the danger was so obvious that no ordinarily prudent and cautious man would venture on it or over it. 20 App. 21 (5) (92 S. E. 405).

A traveler may know of a defect in a bridge or abutment forming part thereof, and that there is some danger in attempting to go on or over it, and still may recover from county for injuries sustained in so doing, if it clearly appears that danger was not obviously of such character that

driving over bridge would necessarily amount to want of ordinary and reasonable care and diligence, and if it also appears that in driving over bridge plaintiff in fact observed such care and diligence. 20 App. 21 (5) (92 S. E. 405).

Burden: Court did not err in charging that burden of proof was on plaintiff to prove that his own negligence was not the direct proximate cause of the injury, and that this negligence did not contribute thereto. 18 App. 592 (4) (90 S. E. 92).

Charge: Not error to fail to charge the principle of this section, in absence of request, where court did charge that the law imposes on plaintiff duty of exercising ordinary care to avoid injury, and that plaintiff could not recover if by the exercise of ordinary care he could have avoided the injury. 140/254 (3) (78 S. E. 925).

Charge that if plaintiff could by exercise of ordinary care have avoided consequences to himself of defendant's negligence, if defendant was negligent, there could be no recovery, being in effect the language of this section, was not erroneous. 140/573, 574 (2) (79 S. E. 475).

Charge that law declares that the precise thing that every man is bound to do before stepping upon a street railroad is that which every prudent man would do under like circumstances, and if the jury believed that every prudent man would look and listen, so must every one else, or take the consequences so far as the consequences may have been avoided by that means, was not erroneous. *Id.* 573, 574 (3).

Failure to charge that if plaintiff by ordinary care could have avoided the injury she could not recover was error. 142/770, 771 (6) (83 S. E. 792).

Under pleading and proof here, failure to charge that if plaintiff with ordinary care could have avoided consequences of defendant's negligence, he could not recover was error, though such charge was not requested in writing. 143/585 (85 S. E. 707).

Injuries to the person; physical injuries.

Where defendant in action by widow for criminal killing of husband pleaded self-defense, question whether deceased exercised ordinary care to avoid defendant's negligence was not in issue to be charged upon. 144/62 (2) (86 S. E. 248).

Charge in action for death of plaintiff's husband struck by train, was not open to objection that it so included the two distinct rules of law embodied in this section and section 2781 that they modified one another. 144/481, 482 (5) (87 S. E. 388).

Where court instructed that if driver was negligent to some extent, and pedestrian injured was negligent to an equal or greater extent, no recovery could be had, failure to charge that if negligence of pedestrian and that of the driver was equal, plaintiff could not recover, was not error. 13 App. 220, 222 (11) (80 S. E. 36).

Charge under section 2781 that if plaintiff and defendant's agent are both at fault, plaintiff's recovery shall be diminished in proportion to his fault, when qualified by statement under this section, that if he could have avoided injury by ordinary care or his negligence was equal to, or greater than that of agent, he can not recover, was not erroneous. 17 App. 461 (2) (87 S. E. 688).

Charge that if jury believed that railway company and agents were negligent and that deceased was also negligent, they should diminish damages in proportion to amount of default attributable to him, in event that they found for plaintiff, was erroneously refused. 17 App. 629 (4-a) (87 S. E. 909).

Failure to charge that if plaintiff's husband could have avoided consequences caused by defendant's negligence, if defendant was negligent as alleged, plaintiff could not recover, was error. 142/536 (4) (83 S. E. 117).

Omission to charge on doctrine of comparative negligence does not require reversal in absence of request, where right of defendant to verdict has been fairly submitted to the jury. 145/276, 277 (5) (88 S. E. 983).

Where question of diminution of damages by reason of negligence of party injured is not raised by pleadings, not reversible error for court, in absence of request, to omit charge on that subject, where charge had been given as to effect of negligence of injured person upon right to recover at all. 145/696, 697 (5) (89 S. E. 753).

Where court charged that if plaintiff was injured by his own negligence, or that if by exercise of ordinary care he could have avoided consequences of defendant's negligence, he could not recover, it was not error, in absence of timely written request, to fail to give in charge latter part of section 2781. 18 App. 271 (2) (89 S. E. 378).

Charge, "See what the necessity of the plaintiff's using the bridge was,—whether or not—look to her age and all the circumstances surrounding the case in determining whether or not each of these parties used ordinary care," was not subject to criticism that it was calculated to create impression that unless it was absolutely necessary for plaintiff to use the bridge, she would not be entitled to recover. 18 App. 417 (2) (89 S. E. 494).

It was not error, in action for homicide of plaintiff's husband caused by collision between defendant's train and husband's automobile, to charge sections 2781 and 4426 conjunctively. 19 App. 413, 424 (91 S. E. 517).

Error in charging, in immediate connection, section 2781 and this section, without proper explanation, is in effect to qualify former section by latter, and make defendant liable if jury should find both parties negligent, notwithstanding fact that, if plaintiff exercised ordinary care, he could not have been hurt; such a charge, if error at all, is beneficial to plaintiff in action for personal injury. 19 App. 687 (4) (91 S. E. 1074).

Where evidence authorizes charge on subject of contributory negligence (comparative negligence) and apportionment of damages, it is better practice for presiding judge to give it,

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even in absence of request. 21 App. 231 (2) (94 S. E. 50).

Charge that in order for defendant to be liable jury would have to find that it was guilty of negligence in at least one of the ways set out in the petition, and that such negligence caused or contributed to injury of plaintiff was not error. 22 App. 155 (1-a) (95 S. E. 765).

Where, though plea denied negligence on part of defendant and distinctly alleged that homicide resulted from failure of deceased or her husband (one of the plaintiffs) to exercise ordinary care, contributory or comparative negligence was not pleaded in reduction or mitigation of damages, this defense was not directly involved, and, in absence of timely requests in writing for such an instruction, failure of court to instruct jury in regard thereto did not constitute reversible error. 22 App. 313, 314 (3) (96 S. E. 17).

Charge of court as to damages recoverable where disability from injuries is merely temporary was sufficient here, in absence of request for more full instructions on subject. 22 App. 589, 590 (3) (96 S. E. 349).

Failure of court to submit to jury issue made as to plaintiff's exercise of ordinary care, even though not requested so to do, requires new trial. 23 App. 694, 697 (99 S. E. 235).

Child: Parent can not be said to be guilty of negligence because he permits eight-year-old boy to ride tricycle upon public street of sufficient width to make it apparently safe. 14 App. 234 (2) (80 S. E. 661).

Common law: At common law, if negligence of plaintiff contributed to injury, he could not recover. 19 App. 413, 417 (91 S. E. 517); 21 App. 104 (1-b) (93 S. E. 1027).

Crossing: Charge, in action for injuries from running into depression at crossing, that if railroad used reasonable care to keep crossing safe, it would not be liable, but if it failed to do so, it would be liable if plaintiff could not have avoided injury by ordinary care, was proper. 145/276 (2) (88 S. E. 983).

Electricity: Under facts alleged in petition here for personal injury to employee of telegraph company, who had ascended telegraph pole in regular duty, for personal injury from electric company's wire carrying dangerous current, maintained over and across telegraph wires or in close proximity thereto, whether he voluntarily selected dangerous way instead of safe way, with actual or imputable knowledge of the danger, was for jury. 24 App. 390 (2) (100 S. E. 800).

In action for personal injury to telegraph company's employee, who had ascended pole in his regular duties, from wire of electric company carrying dangerous current, and maintained over and across telegraph wire or in close proximity thereto, on facts disclosed whether plaintiff was injured by his own negligence was question on which fair-minded men might disagree, and propriety of conduct was for jury. 24 App. 390 (3) (100 S. E. 800).

No cause of action against city was shown by allegations of petition here upon which it was sought to recover for alleged negligence of city's employee in changing transformers by which city furnished electricity to motor that plaintiff was connecting with elevator in building when injured. 24 App. 799 (102 S. E. 459).

Evidence: Even if contributory negligence is an affirmative defense and must be specially pleaded, unless evidence affirmatively establishes it, whether pleaded or not, can not be employed to defeat the action. 13 App. 220, 221 (6) (80 S. E. 36).

Where in action for negligent tort defendant was alleged to have been intoxicated and negligent and it was also alleged that plaintiff himself had been drinking and was negligent, condition of parties respectively as to intoxication could be shown for consideration of jury to determine diligence or negligence of the parties respectively. 145/696 (2) (89 S. E. 753).

Gas: Petition here alleging that gas company was negligent in failing to have all fixtures properly connected so that gas when turned on would not

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escape, and in falling, after notice and request, to examine fixtures, and in failing to connect them before turning on gas, etc., set out no cause of action against such company, and demurrer was properly sustained. 24 App. 5 (99 S. E. 472).

Intoxication: If person was injured by reason of negligent operation of automobile by another, and was himself negligent, in determining effect of such negligence on his right to recover, if he had voluntarily drunk liquor until he was intoxicated, this would furnish no excuse for his negligence, or relief to him from consequences thereof. 145/696, 697 (2-b) 89 S. E. 753).

Jury: Whether plaintiff by exercise of ordinary care could have avoided consequences of alleged negligence of defendant was question for jury here. 143/216 (2) (84 S. E. 543).

Question of comparative negligence raised here by pleadings presented issue of fact for the jury and furnished no ground for general demurrer to the petition. 13 App. 781 (3) (80 S. E. 29).

Whether plaintiff's husband knew of dangerous condition of defendant's telephone wires charged with electricity and could have avoided injury by using care was question for jury here. 16 App. 864 (4) (87 S. E. 766).

Whether plaintiff by exercise of ordinary care could have avoided injury was for jury, where evidence did not show that he was guilty of negligence per se. 17 App. 699 (1) (87 S. E. 1091).

Where plaintiff's testimony left it doubtful whether with ordinary care he could have avoided injuries, error to grant nonsuit. *Id.* 699 (2).

Under evidence that plaintiff attempted to cross track of defendant company about 105 feet in front of approaching switch engine, which was moving toward him at rate of only two miles an hour, whether plaintiff exercised ordinary care was question for jury. 18 App. 266, 267 (8) (89 S. E. 284).

Ordinarily, question of negligence, both on part of plaintiff and defendant, is for the jury, but where plain-

tiff's petition shows on its face that he has no right to recover, and this question is raised by general demurrer, it is duty of court to sustain demurrer and dismiss petition. 19 App. 413, 418 (91 S. E. 517).

Where there was evidence from which jury could infer negligence on part of defendant, whether consequence of that negligence could have been avoided by exercise of ordinary care on part of deceased or her husband was issue of fact for determination by jury. 22 App. 313 (1) (96 S. E. 17).

Question whether plaintiff in action for injuries caused by stumbling over wires which had been blown down across highway failed to exercise ordinary care was question for jury. 23 App. 169 (4) (98 S. E. 116).

Where railroad company placed hand-car in public road near crossing, and buckets and coats hanging on the car frightened the mule hitched to a buggy in which plaintiff was riding causing it to run away and injure plaintiff, and it appeared that the driver, who saw the car, etc., when he was about thirty feet away, drove the mule to within six feet of the car, and urged the mule on after the mule had stopped and was trembling, it was question for jury whether plaintiff had reasonable opportunity to get out of buggy safely after mule showed symptoms of fright and before it ran away, and whether failure to do so amounted to want of ordinary care. 23 App. 694 (1) (99 S. E. 235).

Notwithstanding this section, questions as to negligence are peculiarly for the jury, and court will not solve them by decision on demurrer except in plain and indisputable cases. 24 App. 390 (3) (100 S. E. 800).

Questions as to negligence, including contributory negligence, are for the jury, and court will not solve them by decision on demurrer except in plain and indisputable cases. 24 App. 390 (3) (100 S. E. 800).

Kerosene: Use of kerosene in starting fire was not such negligence per se as would bar recovery from seller for injuries due to explosion of kerosene. 15 App. 571 (1) (84 S. E. 69).

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Whether kerosene could or could not be used with safety in particular manner in starting fire is question for jury. *Id.* (1-a).

Testimony that witness had used kerosene oil for many years in particular manner was admissible as tending to indicate that person injured from explosion of kerosene with which she was starting fire was not guilty of gross negligence. *Id.* 571, 572 (4).

Ordinance: Where vehicle in which plaintiff was seated was driven in violation of municipal ordinance, from right to left side of city street, across street railroad track, he was not entitled to recover for injuries caused by being struck by car. 16 App. 1 (2) (84 S. E. 209).

Ordinary care and diligence is that care and diligence which every prudent man takes of his own property of a similar nature, which every prudent man would exercise under similar circumstances and like surroundings. 141/140 (2) (80 S. E. 655). 655).

The terms "contributory negligence" and "failure to use ordinary care to avoid injury" are not synonymous, but proof either that person injured used ordinary care, or that party inflicting injury was guilty of such gross negligence that injury of other party could not have been prevented by exercise of ordinary care, may entirely negative existence of contributory negligence. 13 App. 220 (4) (80 S. E. 36).

Where injured person was not employee of person whose negligence was alleged to have caused his injury, contributory negligence could not absolutely defeat his right of recovery. 14 App. 233 (1) (80 S. E. 535).

Charge that if defendant did not use ordinary care and plaintiff did not, then plaintiff could not recover, should have been qualified by limiting effect of plaintiff's failure to use ordinary care to some particular fact causing or contributing to happening which resulted in plaintiff's injuries. 146/157 (2) (91 S. E. 32).

Where both parties are at fault, and plaintiff could not, by exercise of ordinary care and diligence, have avoided injury caused by defendant's negligence, then, notwithstanding plaintiff may have been to some extent negligent, he would be entitled to recover damages, but amount of such damages should be diminished by jury in proportion to amount of fault attributable to him; it is not discretionary with jury to diminish damages in such a case, as law is mandatory. 18 App. 303 (1) (89 S. E. 444).

It was error to charge that if both parties were at fault, and contributing to the injury, but plaintiff could not by use of ordinary care have avoided the injury, then plaintiff would be entitled to recover, but amount of recovery should be reduced in proportion to which negligence on her part bore to all negligence on both sides, causing or contributing to the injury. 18 App. 584, 585 (3) (90 S. E. 103).

Court should have instructed that if jury believed that defendant was negligent, and that plaintiff was somewhat at fault, but in less degree than defendant, plaintiff could recover, unless it appeared that injury was caused by her own negligence, amounting to failure to exercise ordinary care, or that by exercise of ordinary care plaintiff could have avoided consequences of defendant's negligence, and that amount of recovery must be diminished in proportion to amount of fault attributable to plaintiff. *Id.*

Rule stated in this section applies only where defendant's negligence became apparent to person injured, or where, by exercise of ordinary care, he could have become aware of it, and he thereafter failed to exercise ordinary and reasonable diligence to avoid the consequences of defendant's negligence. 19 App. 413, 418 (91 S. E. 517).

Where, under allegations in petition, it is clear that injury resulted from failure on part of plaintiff to exercise ordinary care, no recovery could be based on facts alleged, notwithstanding antecedent negligence of

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of railway company, and it was error to overrule general demurrer. 20 App. 362 (93 S. E. 51).

Where evidence, viewed in light most favorable to plaintiff, failed to show any negligence on part of defendant which contributed to injuries sued for, but showed that plaintiff, by exercise of ordinary care, could have avoided injuries, recovery for plaintiff was unauthorized, and it was error to overrule general grounds of defendant's motion for new trial. 23 App. (94 (1) (100 S. E. 25).

Where by allegations of petition itself it clearly appears that plaintiff, by exercise of ordinary care, could have readily avoided consequences flowing from defendant's negligence, petition is subject to demurrer. 24 App. 94 (1) (100 S. E. 25).

Pleading: Petition should not be dismissed on ground that plaintiff could by exercise of ordinary care have avoided the consequences of the negligence alleged, unless the petition discloses facts demanding such conclusion as a matter of law. 13 App. 124 (2) (78 S. E. 944).

Petition here in action for injuries to pedestrian on railroad track showed such negligence upon part of pedestrian, and absence of ordinary care to avoid any negligence upon part of defendant, as would prevent recovery for the homicide. 145/792, 793 (5-a) (89 S. E. 841).

Petition here in action by deputy marshal against railway company for injuries received while inspecting depot held not, as a matter of law, to show that injuries resulted from failure on part of plaintiff to exercise ordinary care, so as to authorize sustaining general demurrer and dismissing case. 23 App. 285 (97 S. E. 886).

Railroads: Employee of common carrier railroad suing the company for personal injuries can not recover if his injuries were caused by his own carelessness amounting to failure to exercise ordinary care, or if by exercise of ordinary care he could have

avoided the consequences of defendant's negligence. 21 App. 379 (3) (94 S. E. 661).

Negligence of railway company in failing to heat and to keep in proper condition heating apparatus of mail-car in which plaintiff was working as postal clerk in cold weather did not entitle plaintiff to recover damages from resulting illness, where it appeared that he took the risk of working in the car with knowledge of its condition. 23 App. 594 (99 S. E. 218); 149/713 (101 S. E. 798).

Where defense to suit against railroad company for personal injuries to passenger in alighting from train at station was that injuries resulted solely from lack of ordinary care on part of passenger, court erred in charging that if jury believed that plaintiff negligently, and without exercising ordinary care, brought about the injuries, and that railroad had exercised extraordinary diligence in protecting plaintiff, she would not be authorized to recover. 20 App. 550 (3) (93 S. E. 281).

Street railroads: If injuries resulting from negligence of man in charge of electric car could have been avoided by exercise of ordinary care by plaintiff, no recovery can be had by him. 16 App. 741, 748 (86 S. E. 83).

Telephone lineman: Where lineman of telephone company with several months' experience, age 20 years, and not lacking in intelligence, was injured by contact with electric light wire, strung on poles in close proximity to poles of telephone company and from which insulation had been worn off near telephone pole which lineman climbed, he knowing, or being able to know by ordinary diligence, that wires were so exposed, he was not entitled to recover from municipality which owned the electric light wires. 18 App. 490 (1) (89 S. E. 594).

Admission of lineman of telephone company that he had been warned by his employer to look out for worn insulation of electric light wires strung

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on poles in close proximity to telephone poles, together with other testimony that defective insulation was easily apparent at point where he was injured, showed that he failed to exercise ordinary care to prevent injury resulting from improper insulation. 18 App. 490, 491 (1-a) (89 S. E. 594).

Under allegations of petition here, plaintiff had cause of action against city for injuries caused by electricity from electric light wires of city on which insulating material had become worn, and with which he came in contact with on his way from work as lineman of telephone company, when descending telephone company's pole to which they were attached. 18 App. 603 (90 S. E. 76).

Tenant: Whether or not condition of bottom step of house, of which injured person had knowledge at time she attempted descent of steps, was sufficient to charge her with knowledge of defect in particular step, breaking of which produced injury, and to show want of care on her part

in attempting to use steps at all, was question for jury. 18 App. 236 (89 S. E. 437).

When rented premises become out of repair it is duty of tenant to abstain from use of that part of premises, use of which is attended with danger; it is his duty to use ordinary care, and if by use of such care consequences of defendant's negligence could have been avoided, he can not recover. 19 App. 485 (2) (91 S. E. 875).

Where, under allegations of plaintiff's petition, defect in rented property must necessarily have been plainly apparent, and tenant not only had opportunity equal to that of landlord of discovering and understanding the defects, but had actual notice thereof prior to time of damage or injury, before landlord would be liable in damages to tenant for resulting injuries it must appear that notice of such defects had first been given him. 24 App. 94 (2) (100 S. E. 25).

§ 4427. (§ 3831.) Malpractice of surgery and medicine.

Care and skill: Whether surgeon has been guilty of malpractice should be determined by rule laid down in this section. 144/261, 262 (3) (86 S. E. 934).

While expert evidence tending to show recognized method of operating may be considered, standard of care and skill required by this section is preferable to comparison with "average surgeon." *Id.*

Jury, in determining whether surgeon has used reasonable care and skill, may consider place of operation, circumstances surrounding it, defendant's situation with respect thereto, and all evidence which throws light on the matter. *Id.*

Charge on degree of skill required, stating that such skill includes an ability to perform operation in an

"approved" way, though true in law, is objectionable in not explaining the word "approved," or stating approval was necessary. 144/261, 262 (3) (86 S. E. 934).

Pain and suffering: Pleading and proof here authorize charge on rule for estimating damages for "pain and suffering," though words quoted were not contained in either. 144/261, 262 (5) (86 S. E. 934).

Photograph: Overruling of ground of demurrer seeking to have photograph of "present condition" of plaintiff's injured arm stricken from petition was error. 144/261 (1) (86 S. E. 934).

Photograph of wound caused by malpractice is admissible, when proven to be correct, to show details and extent of injury. *Id.* 261, 263 (6).

Injuries to reputation; of libel and slander.

ARTICLE 2.

Injuries to Reputation.

SECTION 1.

Of Libel and Slander.

§ 4428. (§ 3832.) Libel.

Business: Though publication in terms designated a certain named company, it was competent for plaintiff to show that he formerly did business under name of company designated, that his name was a part thereof and that libelous statements referred to him. 143/41 (1) (84 S. E. 119).

Court and jury: Whether statement that plaintiff was in pecuniary difficulties and forced to retire from business at instance of defendant as a creditor was libelous was question for jury. 143/41 (3) (84 S. E. 119).

Damages: Where language of publication is libelous per se plaintiff may recover damages without proof of special damages. 143/41, 42 (4) (84 S. E. 119).

Where plaintiff was not in business at time of publication he can not recover general damages on ground that such publication injured him in his business, though he re-entered business after publication. *Id.* 41, 42 (5).

Unless matter published is libelous per se plaintiff can not recover general damages because of publication suggesting that he is insolvent, without showing that he was in business at time of publication. *Id.*

Insolvency: Fact that plaintiff had sold to defendant the trade-name and good will of company designated in libelous publications did not authorize defendant to publish matter suggesting that plaintiff was insolvent. 143/41 (2) (84 S. E. 119).

Larceny: Words imputing crime of larceny are slanderous per se. 24 App. 587 (1) (101 S. E. 765).

Liquor: Prior to May 1, 1916, it was not unlawful in Georgia for common carriers to transport and deliver in-

toxicating liquors; hence, in 1914, for railroad company to receive and transport intoxicating liquors, duly delivered to it and consigned to person whose name appeared on labels on packages, did not entitle consignee to maintain action for libel against railroad company, even though he had notified agent that his name was being improperly used, and that shipment of liquor in his name was against his express orders. 18 App. 539 (3) (90 S. E. 81).

Though railroad company knew that whisky was not really consigned to plaintiff, where it was received by railroad company as freight shipment addressed to one of that name, it became duty of company, as common carrier, to notify one of that name and address that such freight had been received; until after reasonable time expires after arrival of freight, company is liable as common carrier, but if company gives notice to one to whom freight is addressed liability as common carrier ceases and that of warehouseman begins. 18 App. 539 (4) (90 S. E. 81).

Libel can not be predicated of true statement; hence, where liquor has been received at railroad depot, consigned to named person, simple statement of this fact is not actionable, even though liquor was wrongfully shipped to such person. 18 App. 539, 540 (5) (90 S. E. 81).

Notwithstanding it may be violation of law for common carrier to deliver intoxicating liquors to person using assumed or fictitious name, even if it be true name of another person, and though receipt for shipment be signed in assumed or fictitious name, it does not give right of action for

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libel against carrier to person whose name is thus assumed. 18 App. 539, 541 (6) (90 S. E. 81).

Where one person, in order to obtain liquor consigned in name of another, forges name of consignee to order for liquor, it is not actionable for carrier to retain in its files the forged order, even though files may be subject to inspection of company's employees, and even though carrier knows document is a forgery. 18 App. 539, 541 (7) (90 S. E. 81).

Previous difficulty: In action for damages based upon publication of language which is libelous per se, accusation in which is admittedly un-

§ 4429. (§ 3833.) **Malice.**

Good faith: Charge that if plaintiff was not guilty of matters and things set up and charged against him in circular, and defendant published the circular and it was for purpose of injuring plaintiff, then plaintiff would be entitled to recover against him in such amount as in judgment of

§ 4430. (§ 3834.) **Publication.**

Letter: Where officer of corporation, in prosecution of its business, dictates to his stenographer a letter, directed and mailed to another agent of corporation, charging commission of crime by third person, all being employed by same corporation, stenographer and

§ 4431. (§ 3835.) **Libel by newspaper.**

Jury: Question for jury in action for libel whether publication of such libel would naturally result in republication in other newspapers or periodicals. 145/694, 696 (4) (89 S. E. 759).

Malice: Where libelous article appeared in newspaper and subsequently editorial reference was made to the incident, the editorial may be pleaded to show malice and aggravation of the tort. 145/694, 695 (2) (89 S. E. 759).

Pleading: Petition here charging that defendant newspaper had falsely and maliciously published in its news columns of and concerning plaintiff, that he, being at the time mayor of a city, had taken advantage of his

true, mere fact of previous difficulties between parties, or other alleged mitigating circumstances, affords no complete defense to action, and plea setting up such facts as defense should be stricken on timely motion. 24 App. 587 (3) (101 S. E. 765).

Special damages: Where language of publication is libelous per se, plaintiff may recover general damages without proof of special damage. 24 App. 587 (2) (101 S. E. 765).

Thief: To publish that one is a "thief" imputes crime of larceny and is libelous per se. 24 App. 587 (1) (101 S. E. 765).

jury would be fair, just, and proper, was not an accurate statement of the law, since, unless communication be privileged one, bona fides of motive, purpose, and intent of person publishing libel is not involved. 23 App. 301, 302 (5) (98 S. E. 101).

addressee of letter are not to be regarded as third persons, in sense that dictation and mailing of letter, stenographer's knowledge of it, and their reading of it constitute publication of a libel. 18 App. 414 (1) (89 S. E. 429).

official position to subject to gross indignity a certain woman lecturer, because plaintiff had taken offense at lecture criticising conduct of manufacturing establishment because of their employment of child labor in factories, of one of which plaintiff was superintendent, was not subject to general demurrer. 145/694 (1) (89 S. E. 759).

Allegation in petition that newspaper in which matter alleged to be libelous was printed circulated among foreign nations and among many of the various newspapers of the United States was not open to demurrer on ground that petition did not show in what foreign nations the newspaper

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circulated, nor what newspapers in the United States, nor where they are located, which circulated the article in question. 145/694, 695 (3) (89 S. E. 759).

Allegation that article alleged to be false and libelous was circulated

broadcast throughout Georgia and throughout the United States, was sufficient without showing in what other states and cities newspapers publishing articles were sold and circulated. 145/694, 696 (5) (89 S. E. 759).

§ 4433. (§ 3837.) Slander.

Crime: Charge that woman had raised up her children to steal, that she had plotted to burn defendant out, and that he would heap coals of fire on her head in hell, for that was where she was going when she died, do not charge a crime under first division of this section. 22 App. 11, 13 (95 S. E. 385).

Debasing act: Charge that woman had raised up her children to steal, that she had plotted to burn defendant out, and that he would heap coals of fire on her head in hell, for that was where she was going when she died, do not come under the second division of this section; expression, "guilty of some debasing act which may exclude him from society," has reference to those repulsive acts which would cause him to be shunned or avoided. 22 App. 11, 12 (95 S. E. 385).

Innuendo can not enlarge meaning of unambiguous statement or question. 18 App. 457 (5) (89 S. E. 533).

If words spoken are plain and unambiguous and do not impute a crime, they can not be enlarged and extended by an innuendo. 22 App. 11, 12 (95 S. E. 385).

Jury: If words are susceptible of two constructions, one of which is innocent and the other charging a crime, question for jury may be raised by proper allegations as to circumstances and meaning intended. 142/267 (1-a) (82 S. E. 646).

§ 4435. (§ 3839.) Truth justifies.

Burden: Where one defendant admitted alleged slanderous language and pleaded truth in justification, burden was on him to sustain plea by preponderance of evidence. 24 App. 720 (2) (102 S. E. 169).

Charge that, to sustain plea of truth

Larceny: Words imputing to plaintiff crime of larceny were slanderous per se. 16 App. 649 (3) (85 S. E. 936).

Pleading: Where words spoken do not impute a crime, general allegation that they do so is demurrable. 142/267 (1) (82 S. E. 646).

Petition here in action by former employee of defendant corporation, alleging his arrest and prosecution by a third person because of certain false and defamatory words of an agent of defendant, held not subject to general demurrer. 18 App. 483 (89 S. E. 597).

Special damages need not be shown in action by farmer for slander consisting in charges against him in reference to his trade. 142/267 (2) (82 S. E. 646).

Charge that woman had raised up her children to steal, brought them up to steal, that she had plotted to burn defendant out, and that he would heap coals of fire on her head in hell, for that was where she was going when she died, do not charge commission of crime punishable by law, and, in action for slander, it was essential to allege special damages. 22 App. 11 (95 S. E. 385).

Trade: Person conducting a general farming business is engaged in a trade within this section. 142/267 (2) (82 S. E. 646); 19 App. 554 (1) (91 S. E. 889).

in justification of slanderous language, defendant must prove plaintiff "actually" guilty, while standing alone, was objectionable in that word "actually" placed too heavy a burden on defendant. 24 App. 720 (2) (102 S. E. 69).

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Taken in connection with other charge that it was only necessary to sustain plea by preponderance of evidence, such charge was not error. *Id.*
Evidence: Where verbal statement is slanderous per se, proof of slanderous

words places on defendant burden of either proving truth of his accusation or establishing that communication was privileged. 16 App. 649 (3) (85 S. E. 936).

§ 4436. (§ 3840.) Privileged communications.

1.

Prosecution: Communications which would otherwise be slanderous are protected as privileged, if made in good faith in prosecution of an inquiry regarding a crime which had been committed, and for purpose of detecting and bringing to punishment

the criminal. 18 App. 457 (3) (89 S. E. 533).

Statements made in prosecution of efforts to recover property which had been stolen are protected as privileged communications. 18 App. 457 (3) (89 S. E. 533).

2.

Church tribunal: The law recognizes the necessity and propriety of investigation by church of alleged misconduct on part of its members; charges which may be preferred either orally or in writing in bona fide discharge of such duty are privileged communications,

even though they should in fact be entirely erroneous; charges actually known to be false when entered, maliciously and willfully made, with intent to injure another, are not privileged. 23 App. 238, 239 (3) (98 S. E. 122).

6.

Charge: Where alleged libel, if it were in fact untrue, could not be justified on ground that it was made bona fide and related to acts of plaintiff as a public man and in his public capacity, contention that subsection 6 being

applicable, it is not cause for new trial that other parts of section 4436, which judge read to jury, were not applicable, is without merit. 23 App. 301 (3) (98 S. E. 101).

General Note.

Charge: Where charge giving this section to jury, when only subsection 6 was claimed to be applicable, might have reasonably misled or confused jury to plaintiff's prejudice, new trial is proper. 23 App. 301 (3) (98 S. E. 101).

Evidence: Where verbal statement is slanderous per se, proof of slanderous words places on defendant burden of either proving truth of his accusation or establishing that communication was privileged. 16 App. 649 (3) (85 S. E. 936).

Good faith: Charge that if plaintiff was not guilty of matters and things set up and charged against him in circular, and defendant published the

circular and it was for purpose of injuring plaintiff, then plaintiff would be entitled to recover against him in such amount as in judgment of jury would be fair, just, and proper, was not an accurate statement of the law, since, unless communication be privileged one, bona fides of motive, purpose, and intent of person publishing libel is not involved. 23 App. 301, 302 (5) (98 S. E. 101).

Pleading: Petition sets forth no cause of action for libel and slander, where alleged acts and statements of defendants, upon which suit was based, were privileged communications. 21 App. 653, 654 (2) (94 S. E. 827).

§ 4438. (§ 3842.) Allegations in pleadings privileged.

Stated. 21. App. 653 (1) (94 S. E. 827).

Malicious prosecution,

SECTION 2.

Malicious Prosecution.

§ 4439. (§ 3843.) Malicious prosecution.

Stated. 19 App. 685 (1) (91 S. E. 1056).

Abuse of process: Action will not lie for malicious abuse, or malicious use, of criminal process. 14 App. 147 (2) (80 S. E. 519).

Though recovery might have been authorized in suit for abuse of legal process under some of the allegations of the petition as against some of the defendants named therein, where joint recovery against all of the defendants would not have been authorized, demurrer complaining of misjoinder of parties was well founded. 21 App. 613 (1) (94 S. E. 822).

Malicious use of legal process is where plaintiff in civil proceeding employs court's process in order to execute object which law intends for such process to subserve, but proceeds maliciously and without probable cause. 23 App. 287 (1) (98 S. E. 190).

Malicious use of legal process is where plaintiff in civil proceedings willfully misapplies process of court in order to obtain object which such process is not intended by law to effect. 23 App. 287 (2) (98 S. E. 190).

In order for one to recover for malicious use of legal process, malice, want of probable cause, and termination of proceedings in favor of defendant are necessary before suit may be brought. 24 App. 402, 403 (5) (100 S. E. 766).

Bail trover: Not error to strike out, in action of bail trover, so much of defendant's plea as sought to recoup damages for alleged malicious abuse of process in instituting the action. 142/309 (3) (82 S. E. 888).

Where there is nothing in petition to show that collection agent of defendant had authority to institute bail proceeding in name of his principal agent the third person who never had possession, etc., of piano sold, and where proceeding was not to recover the piano, but maliciously, nor

anything to show that the principal, with full knowledge of all material facts, ratified the act of the agent in instituting bail-trover proceeding, court did not err in sustaining demurrer to and dismissing the petition. 23 App. 655 (99 S. E. 136).

Conspiracy: An overt act must be done in pursuance of and in execution of alleged conspiracy, before action on case for malicious prosecution can be maintained against alleged conspirators. 18 App. 457 (2) (89 S. E. 533).

Malice: In order to recover for malicious prosecution, it must appear that criminal prosecution has terminated in favor of plaintiff, and burden is on him to show that it was maliciously carried on, and that it was without probable cause. 24 App. 503 (2) (101 S. E. 309).

While want of probable cause will not be inferred from fact that malice on part of prosecutor is shown to have existed, yet proof of total lack of probable cause may be sufficient to authorize rebuttable inference establishing existence of malice. 24 App. 503, 504 (4) (101 S. E. 309).

Malicious arrest: Actions for malicious prosecution and malicious arrest are essentially of the same nature, the former being appropriate to arrest under criminal process and the latter to arrest under civil process. 142/138 (1) (82 S. E. 537).

Petition here set forth cause of action, though certain paragraphs were subject to special demurrer. 13 App. 737 (79 S. E. 922).

In action for malicious use of legal process, demurrer on grounds that petition failed to allege want of probable cause, and did not allege that action on which process issued had been finally determined in favor of defendant therein, was properly sustained. 146/87 (90 S. E. 709).

Petition in action for damages for institution, continuation and pros-

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ecution of groundless, false, and malicious suits brought without probable cause, which fails to allege that suits referred to had terminated in favor of defendant therein, was insufficient to justify recovery. 21 App. 653, 654 (3) (94 S. E. 827).

Amended petition alleging that prosecution was instituted against plaintiff and warrant sworn out by named person under advice and direction of president of defendant com-

pany, for purpose of collecting alleged indebtedness which company held in shape of draft payable to it, signed by plaintiff, and that prosecution was so instituted when "the said defendant" knew that plaintiff had violated no criminal law of Georgia, and that prosecution was abandoned, in that they failed to appear and prefer indictment, etc., failed to set forth cause of action. 24 App. 526 (101 S. E. 584).

§ 4440. (§ 3844.) Probable cause.

Stated. 19 App. 685 (3) (91 S. E. 1056).

Applied. 142/133, 137 (82 S. E. 535).

Abandonment: Mere fact that prosecution was abandoned or that person charged with criminal offense has, upon trial therefor, been acquitted, is not sufficient to prove malice or want of probable cause. 24 App. 503 (3) (101 S. E. 309).

Abuse of process: In suit for damages growing out of perversion of court's process, it is not necessary to show that former litigation was without probable cause or that it terminated prior to institution of suit for damages. 23 App. 287 (2) (98 S. E. 190).

Advice of counsel: Fact that prosecution was instituted on advice of counsel is circumstance which may be considered by jury in passing upon questions of malice and want of probable cause. 24 App. 503, 504 (5) (101 S. E. 309).

Advice of solicitor-general that facts as stated constitute indictable offense is no defense, unless it is given after full, fair, and complete statement by prosecutor of all facts known to him relating to alleged offense. 24 App. 503, 504 (5) (101 S. E. 309).

Burden is upon plaintiff in suit for damages on account of alleged malicious prosecution to show that prosecution was instituted without probable cause. 22 App. 403 (1) (95 S. E. 1001).

Court: Where material facts are not in dispute, existence or nonexistence of probable cause for prosecution is question of law for court. 20 App. 639 (1) (93 S. E. 316).

Good faith: Where, while good faith of person against whom defendant instituted prosecution alleged to be malicious may be reasonably inferred from facts and circumstances in proof, it is clear, according to undisputed facts in case that there was probable cause for prosecution, verdict in favor of plaintiff was contrary to law. 20 App. 639 (2) (93 S. E. 316).

Judgment in lower court: Judgment in favor of plaintiff in trover proceeding, even though erroneous, is sufficient to conclusively establish existence of probable cause, so as to protect such plaintiff from any future claim of malicious prosecution. 24 App. 402, 403 (5) (100 S. E. 766).

Petition: Where, in action for damages for malicious prosecution, petition alleges that prosecution was without probable cause, allegations showing that defendant appeared before grand jury as witness and succeeded in getting true bill returned against petitioner, on indictment drawn by solicitor-general, do not render petition subject to general demurrer, when it does not appear that defendant made to solicitor-general a fair, truthful, and complete statement of facts connecting petitioner with alleged criminal offenses. 22 App. 491 (1) (96 S. E. 343).

§ 4445. (§ 3849.) What is a prosecution.

Stated. 19 App. 685 (2) (91 S. E. 1056).

Other torts to the person; false imprisonment.

§ 4446. (§ 3850.) When the right accrues.

Applied. 142/133, 137 (82 S. E. 535).
Civil case: Action for malicious abuse of legal process may be maintained before action in which such process was issued has terminated. 20 App. 398 (1) (93 S. E. 25).

Action for malicious use of legal process, where no object is contemplated to be gained by such use other than proper effect and execution of the process, can not be commenced until the cause of action in which the process issued has been finally determined in favor of defendant therein. 20 App. 398 (1) (93 S. E. 25).

Petition in action for malicious use of legal process which does not allege that action upon which process issued had been finally determined in favor of defendant therein is demurrable. 20 App. 398 (2) (93 S. E. 25).

Compromise: If termination of prosecution has been brought about by compromise of the parties, action can not be maintained. 142/138 (2) (82 S. E. 537).

Petition which did not aver that prosecution of plaintiff had terminated did not state action for malicious prosecution in view of this section. 14 App. 147 (80 S. E. 519).

Petition alleging that defendants conspired together wickedly, falsely, and maliciously, for sole purpose of instituting, and to have instituted, a

wilful, wicked, false, and malicious criminal prosecution against him, but not alleging that any prosecution was ever instituted, was insufficient. 18 App. 457 (1) (89 S. E. 533).

Allegation in petition that plaintiff had never at any time been taken before any magistrate, committing officer, or court for hearing or trial upon warrant sworn out against him or charge which defendants alleged and claimed against, and that there had not been any indictment against him, although there had been terms of the superior court at which grand jury was empanelled, did not constitute sufficient compliance with requirement that it must affirmatively appear that there had been a termination of the prosecution before any right of action would arise. 21 App. 613, 614 (2) (94 S. E. 822).

Termination of litigation: In suit for damages growing out of malicious use of process, it must appear that previous litigation has finally terminated against plaintiff therein. 23 App. 287 (1) (98 S. E. 190).

In order to recover for malicious prosecution, it must appear that criminal prosecution has terminated in favor of plaintiff, and burden is on him to show that it was maliciously carried on, and that it was without probable cause. 24 App. 503 (2) (101 S. E. 309).

ARTICLE 3.

Other Torts to the Person.

SECTION 1.

False Imprisonment.

§ 4447. (§ 3851.) Definition of false imprisonment.

Stated. 140/579 (79 S. E. 456); 142/133 (2) (82 S. E. 535); 19 App. 685 (2) (91 S. E. 1056).

Pleading: Petition here alleging that defendants caused certain detectives to go to plaintiff's room, and to ar-

rest and imprison him without warrant, etc., held to set forth good cause of action. 142/133 (3) (82 S. E. 535).

Railroad: Arrest of plaintiff by station policeman at instance of gateman, when he passed through gate of sta-

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tion on way to mail train, after he had requested them to allow him to go through the gate to mail his letters and they had refused him permission, did not give him right of action against the station company, although he alleged that it was customary for people generally to go to the mail train to mail letters, and that persons

who were not passengers and who stood on same footing with him were permitted by gatekeeper to pass through the gates. 18 App. 570 (90 S. E. 84).

Warrant: To imprison person under valid warrant does not constitute false imprisonment. 14 App. 147 (80 S. E. 519).

§ 4448. (§ 3852.) Under warrant.

Bad faith: Where bank directing arrest to be made, and sheriff making the arrest, were not shown to have acted in bad faith, they were not liable. 140/579 (79 S. E. 456).

Clerk of court, who was directed by judge of superior court to issue instant an attachment for contempt

of court against a sheriff, not liable for false imprisonment. 140/579 (79 S. E. 456).

Valid warrant: To imprison person under valid warrant does not constitute false imprisonment. 14 App. 147 (80 S. E. 519).

§ 4449. (§ 3853.) Suit for joint act of several.

Constable: Where action was brought against constable and surety on his bond and a third person for damages on account of arrest and confinement of plaintiff by constable and third defendant together, without warrant or other legal process and without proba-

ble cause, and it was alleged that constable acted in official capacity and committed breach of bond, demurrer on ground of misjoinder of parties and of causes of action should have been sustained. 23 App. 430 (98 S. E. 358).

SECTION 2.

Malicious Arrest.

§ 4450. (§ 3854.) Definition.

Stated. 19 App. 685 (1) (91 S. E. 1056).

Malicious prosecution: Actions for malicious prosecution and malicious arrest are essentially of the same nature, the former being appropriate to arrest under criminal process and the latter to arrest under civil process. 142/138 (1) (82 S. E. 537).

Petition failing to allege that order of arrest had been vacated or warrant dismissed before institution of action was insufficient. 14 App. 147 (80 S. E. 519).

Petition here in action by former employee of defendant corporation, alleging his arrest and prosecution by a third person because of certain false and defamatory words of an agent of defendant, held not subject to general demurrer. 18 App. 483 (89 S. E. 597).

Termination: Necessary to allege termination of proceedings out of which writ issued, in favor of plaintiff. 142/138 (1) (82 S. E. 537).

§ 4452. (§ 3856.) Probable cause.

Stated. 19 App. 685 (3) (91 S. E. 1056).

Nuisances and other injuries to health.

SECTION 3.

Nuisances and Other Injuries to Health.

§ 4454. (§ 3858.) Public and private.

Cited. 141/163, 167 (80 S. E. 718).

Damages: General damages, in addition to damages for lost time, loss of services of wife, and medical expenses, were recoverable in action for causing water to form into stagnant pond by building of dam. 19 App. 347 (91 S. E. 442).

Electric wires: Action by private person against electric company for damages on account of unauthorized maintenance over its land of electric wires charged with high voltage, alleged to be nuisance and injurious to property, in which only prayer is for damages and for abatement of nuisance by removal of wires from property under order and decree of court, is not an equitable action. 147/334 (1) (94 S. E. 249).

Encroachment on public alley is a public nuisance. 143/106 (1) (84 S. E. 440).

Evidence that building of dam backed up water, causing it to stagnate and to produce offensive odors, was admissible under pleadings here. 19 App. 347 (91 S. E. 442).

Explosives: Petition here in action against powder companies for dam-

ages from maintenance of nuisance in proximity to plaintiff's land, was demurrable, where it appeared that any damages to plaintiff's property was *damnum absque injuria*. 143/465 (85 S. E. 344).

Lewd house is per se public nuisance. 145/398 (1) (89 S. E. 332).

A lewd house being per se public nuisance, court of equity has jurisdiction to abate same on suit brought by solicitor-general on information of citizen as relator, without alleging or proving special injury to property. 146/767 (1) (92 S. E. 513).

Measure of damages: Damages recoverable for nuisance are not limited to injury to realty, but injury to health may furnish basis for such recovery. 143/776 (1) (85 S. E. 945).

Notice: Where action is against alienee of person creating nuisance, notice must be given such person to abate such nuisance. 140/713, 714 (3-d) (79 S. E. 850).

Prescription: A person can not, by prescription or otherwise, acquire a right to maintain a nuisance. 140/713, 717 (79 S. E. 850).

§ 4455. (§ 3859.) Special damage.

Stated. 149/345 (1) (100 S. E. 207).

Cited. 141/163, 167 (80 S. E. 718).

Abatement of nuisance: Section cited as to right of private citizen to have public nuisance enjoined. 145/663, 669 (89 S. E. 774).

Cotton gin: Petition by several citizens owning homes in main residential section of town to have defendant enjoined from erection and operation of public ginnery and feed-crushing mill in close proximity to homes or respec-

tive petitioners, alleging that operation of plant would be nuisance and would result in damages to their respective dwellings, market value of each being alleged, set forth cause of action. 149/379 (100 S. E. 371).

Special damage: Person whose property rights will be injuriously affected by unauthorized obstruction of street may sue to prevent such obstruction. 143/106 (1) (84 S. E. 440).

§ 4456. (§ 3860.) Injury to person or property by nuisance.

Stated. 149/345 (2) (100 S. E. 207).

Cited. 141/163, 167 (80 S. E. 718).

Explosives: Petition here in action against powder companies for damages from maintenance of nuisance

in proximity to plaintiff's land, was demurrable, where it appeared that any damages to plaintiff's property was *damnum absque injuria*. 143/465 (85 S. E. 344).

Nuisances and other injuries to health.

§ 4457. (§ 3861.) **What is a nuisance.**

Cited. 141/163, 165 (80 S. E. 718).
 Stated. 140/713 (1) (79 S. E. 850);
 149/345 (2) (100 S. E. 207).
 Applied. 21 App. 384, 387 (94 S. E. 604).

Air: Every person has a right to have the air diffused over his premises, whether located in the city or country, in its natural state and free from artificial impurities; by air in its natural state and free from artificial impurities is meant pure air consistent with the locality and character of the community. 149/345 (3) (100 S. E. 207).

The pollution of air, so far as reasonably necessary to the enjoyment of life and indispensable to the progress of society, is not actionable. 149/345 (3-b) (100 S. E. 207).

Where two distinct corporations, through their respective and separate manufacturing plants, discharge noxious and poisonous gases into the atmosphere, which invade premises of adjacent premises and cause an actionable nuisance, the corporations are not jointly liable for damages, where there is no common design or concert of action, but each is liable for its proportion of damages only. 18 App. 472 (1) (89 S. E. 593).

Where noxious and poisonous gases are discharged into atmosphere by two separate and distinct corporations and invade premises of nearby resident, and so poison and befoul the air as to cause sickness and death in his family, and otherwise to injure him, and to create an actionable nuisance, but where there is no common ownership or operation of the fertilizer plants operated by such corporations, no community of interest, and no common design, purpose, concert, or joint action, suit by such adjacent resident against the two corporations jointly, for damage caused by their respective acts, can not be maintained. 18 App. 472 (2) (89 S. E. 593).

Annoyance: Owner of a dwelling-house which he occupies as a home may recover just compensation for annoyance and discomfort occasioned by the maintenance by another of a nuisance on adjacent premises. 141/186,

187 (6) (80 S. E. 642).

Business: Where business itself is legal, it only becomes nuisance when conducted in illegal manner to the hurt, inconvenience or damage of another. 148/152 (1) (96 S. E. 178).

Charge: Though municipal ordinance prescribed method and cause for removal of street obstruction, not error to charge Code definition of nuisance to aid in understanding rights of parties. 15 App. 656, 657 (2) (84 S. E. 151).

Continuing nuisance: Petition alleging that culverts and embankment had been constructed by railroad in such a way as not to drain, but to cause water to pond and overflow plaintiff's land, and that the gradual filling in of the ponds by soil and sediment caused the ponds to increase in size, was held here to be for the recovery of damages resulting from maintenance of continuing nuisance. 140/713 (2) (79 S. E. 850).

Prescription does not run in favor of maintenance of continuing nuisance, though damages can not be recovered further back than four years from bringing of suit. *Id.* 713, 714 (3).

Explosives: Petition here in action against powder companies for damages from maintenance of nuisance in proximity to plaintiff's land, was demurrable, where it appeared that any damages to plaintiff's property was *damnum absque injuria*. 143/465 (85 S. E. 344).

Fertilizer works: Where A filed suit to enjoin B's fertilizer works as nuisance, and C, who owned fertilizer factory alleged by A also to constitute nuisance was not party to suit, but entered with A and B into contract in which he agreed to abide by interlocutory injunction issued against B, which contract upon application of A, and by consent of B, by order of court, was made part of record, C was not party to the cause, and was not bound by judgment of record therein, either by voluntary contract, by order of court, or by estoppel. 149/673 (1) (101 S. E. 799).

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Ginnery: Operation of cotton ginnery so as to force cottonseed into seed-house by "air suction," which method causes great quantity of dust to be expelled through cracks of seed-house and into dwelling-house of adjacent proprietor, to his great discomfort and injury, is invasion of his property rights and amounts to nuisance. 147/195 (1) (93 S. E. 212).

Construction of cotton ginnery without objection from adjacent proprietor will not debar such proprietor from complaining of nuisance and resultant injury due to improper operation of ginnery. 147/195 (3) (93 S. E. 212).

Petition by several citizens owning homes in main residential section of town to have defendant enjoined from erection and operation of public ginnery and feed-crushing mill in close proximity to homes of respective petitioners, alleging that operation of plant would be nuisance and would result in damages to their respective dwellings, market value of each being alleged, set forth cause of action. 149/379 (100 S. E. 371).

Loss of profits: If nuisance interferes with ingress to and egress from a store, or deters customers from resorting thereto, and proximately causes a loss of custom in an established business, this will furnish a basis for recovery of damages. 141/186 (4) (80 S. E. 642).

Loss of custom did not furnish basis for recovery from defendant who erected a dam which created a nuisance by backing water, from which mosquitoes were bred, so that many people in the vicinity were made sick and others moved away. *Id.* 186 (5).

Where an electric company created a reservoir containing stagnant water, causing sickness and the removal of people from the vicinity, thus preventing plaintiff from renting his store-house, and preventing customers from patronizing his mill, damages are not recoverable for such failure to rent and loss of profits unless the injury was willful. 141/172, 173 (2) (80 S. E. 636).

Malaria: Evidence that person living near pond caused by building of dam, and breathing bad odors and impure

air, would be thereby depressed and rendered more susceptible to malarial fever was admissible. 19 App. 347 (91 S. E. 442).

Market value: Where injury from nuisance goes either to the market or rental value of the premises, difference in the market or rental value before the nuisance existed and such value after the nuisance is created is the measure of damages. 141/172, 173 (2-d) (80 S. E. 636).

Where nuisance causes permanent injury to land the ordinary rule is that the measure of damages is the depreciation in the market value; where nuisance is not permanent, the depreciation in the usable or rental value ordinarily furnishes the measure. 141/186 (2) (80 S. E. 642).

Obstruction: Any permanent structure in public road which materially interferes with travel therein is a nuisance *per se*; it is immaterial that sufficient space is left on either side of obstruction for passage of public. 147/760 (2) (95 S. E. 284).

Stationing of wagon, for several months, at given point on public road, and placing peanut roaster and gasoline engine in the road, arranging fruits and bottled soft drinks about the wagon, constitutes a public nuisance, though public road at such point was between forty and fifty feet wide, and though conduct of owner of wagon had not interfered with use of road by public, and though citizens, with exception of one competitor in business, had not complained of such use of the road. 147/760 (3) (95 S. E. 284).

Per se: Nuisance *per se* is an act which is nuisance at all times and under any circumstances, regardless of location or surroundings. 143/465 (85 S. E. 344).

Permanent: Where a nuisance is permanent in its character, and the injury is complete, all damages, both past and prospective, are recoverable in one action. 141/172, 173 (2-c) (80 S. E. 636).

While a recovery may not be had for prospective damages which may result from the continuance of a nuisance, yet, where the damages inflicted

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by the nuisance while in existence are of a permanent character, and go to the entire value of estate affected, recovery may be had for the entire damages in one action. *Id.* 172, 173 (2-d).

Petition: Paragraph of petition, in action for damages from nuisance in form of a reservoir containing stagnant water, seeking to recover damages for loss of the crops of plaintiff's tenants held demurrable. 141/172, 173 (2-a) (80 S. E. 636).

General allegation that plaintiff is entitled to damages caused by a nuisance because, during a certain period, he expended certain sums for physicians' services and medicines for himself and family, was not subject to a special demurrer calling for an itemized statement of the claim. *Id.* 172, 174 (3).

Petition alleging that plaintiff, on account of sickness due to nuisance complained of, lost his pea crop of the value of \$40.00, and potato crop of the value of \$50.00, held not subject to special demurrer. 141/191 (2-a) (80 S. E. 645).

Petition, in action for damages from sickness due to nuisance, need not set out the number of visits paid by a physician, to authorize recovery therefor. *Id.* 191 (2-b).

Allegation that plaintiff lost "expense for moving \$100.00" was not demurrable on ground that the expenses incurred should have been itemized and that it was not the proximate result of the alleged nuisance. *Id.* 191 (2-c).

Allegation that plaintiff's land was permanently decreased in the market value of \$10.00 per acre, without stating what was claimed to be its value, was subject to special demurrer. *Id.* 191 (2-d).

Allegation that in consequence of

sickness to himself and family caused thereby, and their inability to gather crops grown on the land, plaintiff had lost such crops of certain value, there being no other description of the crops thus valued in bulk, was subject to special demurrer. *Id.* 191 (2-e).

Petition alleging that plaintiff had lost part of his crops from sickness of the croppers brought about by a nuisance was subject to special demurrer for failure to state the quantity and character of the crops destroyed. 141/196 (1) (80 S. E. 648).

Sickness: The owner of farm lands upon which is located his dwelling-house, in which he and his family reside, may recover damages for the sickness of himself and family occasioned by maintenance of nuisance on adjacent premises. 141/172, 173 (2-b) (80 S. E. 636).

Smoke is not per se a nuisance; to constitute a nuisance, it must be such as to produce either actual, tangible, and substantial injury to neighboring property itself, or such as to interfere sensibly with its use and enjoyment by persons of ordinary sensibilities. 149/345 (4) (100 S. E. 207).

Use: The privilege of use incident to right of property must be exercised in unreasonable manner, so as to inflict injury upon another unnecessarily. 149/345 (3-c) (100 S. E. 207).

Everyone has right to use property as he sees fit, provided that in so doing he does not invade rights of others unreasonably, judged by ordinary standards of life and according to notions of reasonable men; right to use one's property as he pleases implies like right in every other person, and it is qualified by the doctrine that the use in the first instance must be a reasonable one; the maxim is *sic utere tuo ut alienum non laedas*. 149/345 (3-d) (100 S. E. 207).

§ 4458. (§ 3862.) Right of alienee.

Cited. 22 App. 572, 576 (96 S. E. 570).

Continuing nuisance: Error to charge law applicable to action for damages arising from creation of nuisance, where action was brought for recovery of damages arising from continuing nuisance alleged to be maintained by

alienee of one creating the nuisance. 140/713, 714 (3-a) (79 S. E. 850).

Charge restricting finding of damages solely to elements resulting from increased overflow of water caused by railroad embankment and culverts within a period of four years prior

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to filing of suit was erroneous. *Id.* 713, 714 (3-b).

In such case the jury may, if evidence authorizes it, find whatever damages plaintiff has sustained from maintenance within four-year period, whether it be from increased overflow or otherwise. *Id.* 713, 714 (3-c).

Notice must be given the alienee to abate the nuisance, before action can be maintained. 140/713, 714 (3-d) (79 S. E. 850).

§ 4459. (§ 3863.) **Injunction.**

Building: Generally equity will not enjoin construction of building not in itself a nuisance, but person erecting building will proceed at his peril, whole subject being for jury on the trial. 148/152 (1) (96 S. E. 178).

Crematory: Under evidence here to enjoin erection of crematory by municipal corporation, for consumption of garbage, that hauling of garbage by the residences of petitioners would cause flies and noxious fumes and poisonous gases to endanger health of petitioners and that there were other available vacant lots in more remote section, away from heart of city and residential section thereof, verdict enjoining erection of crematory was authorized. 148/152 (2) (96 S. E. 178).

Damages: Testimony of witness that fact that defendant lived near his property depreciated value of such property was irrelevant in proceeding in name of State to abate lewd house as public nuisance. 145/398 (3) (89 S. E. 332).

Discretion: The injuries may be balanced and the discretion of the chancellor exercised in the grant or refusal of an interlocutory injunction with respect to nuisances. 149/345 (5-d) (100 S. E. 207).

Evidence: Statements in evidence interposed by defendant in interlocutory hearing that land, title to which was in dispute, was part of estate of affiant's father, that plaintiff's land did not extend to water, and that it was owned by affiant's father and reserved by him, were not admissible in evidence in action to enjoin defendant from polluting stream. 141/790 (2) (82 S. E. 241).

Although defendant's dam and reservoir constituted nuisance from which plaintiffs suffered damage, no liability on part of defendant was shown, where dam and reservoir were constructed by predecessor in title of defendant and were not changed by defendant, and there was no showing of any negligent act of defendant or of any damage to plaintiffs after notice to defendant to abate nuisance. 24 App. 664 (101 S. E. 813).

Garbage: Although municipal authorities may have plenary power in matter of collection and disposition of garbage, yet they can not lawfully create, in connection therewith, nuisance dangerous to health or life. 145/511 (89 S. E. 484); 20 App. 718 (1) (93 S. E. 229).

General reputation for lewdness of woman charged with maintaining lewd house, as well as general reputation of house as place of lewdness, is competent evidence. 145/398 (2) (89 S. E. 332).

Ginnery: If injury caused to adjacent property by operation of cotton ginnery be continuing so as to cause constantly recurring grievance, injunction is available remedy. 147/195 (2) (93 S. E. 212).

Construction of cotton ginnery without objection from adjacent proprietor will not debar such proprietor from complaining of nuisance and resultant injury due to improper operation of ginnery. 147/195 (3) (93 S. E. 212).

Lewd house: Judge, in proceeding to abate lewd house as a public nuisance, was without authority to order such house closed. 145/398 (4) (89 S. E. 332).

Multiplicity of suits: Jurisdiction of equity to restrain nuisances is in aid of the legal right when the legal right is inadequate, and to prevent a multiplicity of suits; in cases of nuisances the foundation for the interference of equity rests in the necessity of preventing irreparable injury and multiplicity of suits, and there is in principle no distinction between any of the cases, whether it be smoke,

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smell, noise, or gas. 149/345 (5) (100 S. E. 207).

Obstructions: Where one gives notice of intention to close private way, but has not actually obstructed same, statutory remedies for removing obstructions do not apply; in proper case injunction may issue to prevent threatened injury. 147/34 (92 S. E. 521), 633 (1) (95 S. E. 232).

If threatened obstruction of private way would constitute continuing nuisance, proper case for equitable interference is made. 147/633 (1) (95 S. E. 232).

Public nuisance: Where the evidence is sufficient to authorize a finding that the act complained of was a public nuisance on the public highway, it was not an abuse of the court's discretion to grant an interlocutory injunction. 141/499 (81 S. E. 201).

Court of equity has jurisdiction, at instance of solicitor-general, to restrain by injunction continuance of public nuisance. 147/760 (1) (95 S. E. 284).

Sanitarium: Where, in suit to wholly enjoin operation of sanitarium for colored people as being nuisance per se, and to prevent its maintenance and operation in such manner as to constitute nuisance, it appears that as to latter relief petitioner had no adequate and complete remedy at law, he had right to invoke aid of court of equity. 148/575, 576 (1) (97 S. E. 521).

Smoke: In suit to enjoin continuance of nuisance created by smoke alone, plaintiff can not be denied injunctive relief, his case being otherwise made out, because it would injure defendant or the public to grant it; in such case chancellor has no discretion at final trial. 149/345 (5-c) (100 S. E. 207).

Where in suit to restrain defendant laundry company from using soft coal the evidence in the record is such as to authorize finding by jury that use of coke was at once convenient and practicable, direction of verdict for defendant is error. 149/345 (6) (100 S. E. 207).

SECTION 4.

Of Indirect Injuries to the Person.

§ 4469. (§ 3873.) **Procurer of wrong is joint wrong-doer.**

Conspiracy is not gravamen of charge, in action on the case for conspiracy, but may be both pleaded and proved as aggravating the wrong of which plaintiff complains, enabling him to recover in one action against all as joint tort-feasors. 149/67 (1) (99 S. E. 123); 23 App. 736 (1) (99 S. E. 393).

Petition alleging that three named persons, at time stated, entered into conspiracy to wrongfully withhold from plaintiff certain securities and to convert same to joint use and benefit of said person, that defendants in furtherance of the conspiracy withheld such securities from plaintiff and on day named did convert same to their own joint use and benefit, to the loss and injury of plaintiff in sum alleged as actual value of securities on date of conversion, sufficiently set

forth conspiracy as against general demurrer; nor was petition subject to special demurrer on ground that it lacked sufficient facts or overt acts to support charge of conspiracy. 149/67 (2) (99 S. E. 123); 23 App. 736, 737 (2) (99 S. E. 393).

Servant: Petition in action against chair company for damages alleging that a sprinkler company had a contract with defendant to install sprinkler system, and employed plaintiff to perform mechanical labor of installing this system agreeing to pay him \$2 a day for his time and labor, and that, with knowledge of this, president of chair company, acting with authority for the chair company, after plaintiff had worked part of a day, tortuously forbade his working or coming on the premises, and had the sprinkler company discharge him, to his loss and

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damage, for which he sued, set forth a cause of action. 22 App. 307 (1) (95 S. E. 997).

Trespass: Person who attempts to convey right to use timber for turpentine

purposes on another's land may be sued as joint trespasser with person who enters on land under such attempted conveyance. 14 App. 153 (2) (80 S. E. 664).

CHAPTER 3.

Of Injuries to Property.

ARTICLE 1.

To Real Estate.

§ 4470. (§ 3874.) Interfering with enjoyment of.

Avoid consequences: Whenever right to enjoy one's property to its fullest extent is invaded, and injury arises therefrom, he may recover any damages sustained by reason of such invasion, nor is he bound to do anything to avoid consequences thereof. 146/250 (3) (91 S. E. 63).

Blasting: Petition here construed and held to be for damages caused by blasting defendant's quarry, causing stones to fall on adjacent lands of plaintiff, injuring his buildings and other property thereon, and not for damages arising from negligence in doing the work. 140/632 (1) (79 S. E. 543).

Where grant to land authorized grantee to do blasting thereon, mere fact that stones fell upon the grantor's adjacent land and injured his property would not render grantee liable in trespass for the injury. *Id.* 632 (2), distinguishing 99/110 (24 S. E. 969).

Charge that if grantee was guilty of any tort or violation of duty after

conveyance, causing injury, it would be liable therefor, but not because of its agreement with the grantor on the theory of merger, was proper. 143/206, 207 (4) (84 S. E. 451).

Damages: Court should have instructed that damages recoverable could not exceed value of land. 143/206, 207 (5) (84 S. E. 451).

Evidence in suit against church trustees for trespass on land adjoining church property was insufficient to show perfect title from State to plaintiff where deed on which she relied, while giving her reversionary interest, showed on its face that land had previously been conveyed to church by deed not introduced, and not shown to contain any reversionary clause. 141/528 (81 S. E. 442).

Overflowing of land: Evidence here did not authorize recovery of damages on account of flooding of plaintiff's farm, alleged to have been caused by water from defendant's dams. 20 App. 780 (93 S. E. 521).

§ 4471. (§ 3875.) Right of possession.

Prior possession: Charge relative to prior possession, which would entitle plaintiff to recover unless defendant could show injury under some superior

right, was proper in view of this section and section 5586. 144/210 (1) (87 S. E. 7).

§ 4472. (§ 3876.) Bare possession.

Title: Where plaintiff in action for damage to realty from setting of fire to timber sued as owner of property, and

evidence showed that he was in possession of land under bond for title from one who was holder of legal title,

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it was error for court to refuse to charge that if jury believed plaintiff was in possession but did not own legal title, he could not recover more than such an amount as would represent his

§ 4473. (§ 3877.) **Bare title.**

Heirs: Where, in action for trespass, plaintiff claimed title as heirs, burden

§ 4475. (§ 3879.) **Watercourses.**

Crops: Petition in action to recover damages because of obstruction of a stream which alleges that value of crop of corn destroyed "to petitioner" was \$100, and that the land was damaged to the value "to the petitioner" of \$200, in manner described sufficiently set forth the damages sued for to withstand general demurrer. 21 App. 275 (2) (94 S. E. 315).

Petition alleging that intestate cut ditch through his land, changing channel of certain creek which also ran through plaintiff's land, that intestate continued to divert the waters until certain time, when he negligently allowed ditch to become obstructed, causing backwater on lands of petitioner and causing natural channel to fill up with debris, thereby causing waters to flow in various directions over petitioner's lands and to accumulate and stand in ponds and render the land incapable of use for any purpose, thereby causing petitioner loss of all crops for certain years, to his injury the sum of a stated amount was not demurrable on ground that mere conclusion was stated therein. 23 App. 732 (99 S. E. 310).

Diverting stream: Special damages flowing to plaintiffs on account of diversion of water are recoverable. 147/436 (1-b) (94 S. E. 542).

Freehold: Where petition alleged permanent injury to freehold of plaintiff, for which damages were sought, court did not err in overruling general demurrer. 21 App. 547 (1) (94 S. E. 846).

Measure of damages: Where water is wrongfully diverted causing overflow damages may be allowed for diminution in market value caused by permanent condition, though some of the

interest, and burden would be on him to show by preponderance of evidence what his interest was. 18 App. 421 (89 S. E. 491).

was on mother to show that he was such heir. 143/671 (1) (85 S. E. 870).

overflow may be temporary. 143/206, 208 (6) (84 S. E. 451).

Charge here erroneous where it referred to permanent damages, temporary damages, and rent as if rent were something distinct from temporary damages. Id. 206, 208 (7).

Paragraph of petition in action for damages caused by obstruction of stream which sets forth probable consequences to follow in the future from continued maintenance of obstruction complained of was demurrable. 21 App. 275 (3) (94 S. E. 315).

Mill privileges: Deed here conveying land to middle of original stream entitled grantee to reasonable use of the water in the millpond adjacent to the land, and upon which was located grantee's power plant, provided such use did not materially interfere with the mill privileges conferred in partition with a lower riparian owner, where such owner and such grantee claimed title from a common source. 141/202 (a) (80 S. E. 785).

Overflowing land: Deed here released defendant from damages from proper and non-negligent construction, maintenance, and operation of dam, but did not release him from damages from negligent construction and maintenance thereof. 144/130 (3) (86 S. E. 322).

Under pleadings and proof here in action for damages due to backing water on plaintiff's land, verdict for \$400 was unauthorized. 144/232 (86 S. E. 1093).

Where owner of land traversed by creek sells part of land to municipality, and incorporates in deed covenant that grantee shall have right to take water from stream for use in opera-

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tion of its waterworks, and owner subsequently conveys remainder of tract to another, municipality has no legal right to so construct dam on its land as to cause back-water to fill up channel of creek and tributary ditches on land of upper proprietor, thereby rendering his land wet and unfit for cultivation. 146/250 (1) (91 S. E. 63).

Owner of land is entitled to free and exclusive enjoyment of all water courses, not navigable, flowing over his land, and obstruction of such water course by lower proprietor, so as to cause water to overflow or injure land of upper owner, or any right appurtenant thereto, is trespass upon his property. 146/250 (2) (91 S. E. 63).

Cause of action is sufficiently set forth to withstand general demurrer, where one seeking to recover damages because of obstruction occurring on land of another in stream flowing through his own land and across land of other person, which resulted from natural causes, where plaintiff alleges that defendant failed and refused, after notice of obstruction, not only to remove it himself, but to permit plaintiff to remove it at his own expense, and that following a "heavy rain" water of the stream was impeded by the obstruction and overflowed his lands, destroying crop thereon and injuring lands themselves. 21 App. 275 (1) (94 S. E. 315).

Pollution: Where question at issue was whether pollution of stream of water was permanent, proof that horse belonging to plaintiff drank water therefrom on plaintiff's premises some time after institution of suit, and in consequence soon thereafter died, was relevant, as tending to show continuing nature of injury. 21 App. 547, 549 (4) (94 S. E. 846).

Where no recovery was sought for value of horse in action based on pollution of stream, evidence that horse belonging to plaintiff drank water from stream on plaintiff's premises and soon thereafter died was admissible to sustain contention that polluted water was injurious to animal

life and would prevent use of stream in supplying water to hogs, cattle, and other animals raised or pastured on lands of plaintiff. 21 App. 547, 549 (4) (94 S. E. 846).

Court did not err, in action against chemical company based on pollution of stream of water, in rejecting testimony from president of defendant company that since construction and operation of fertilizer plant alleged to have caused the damage sued for, the market value of plaintiff's land had been enhanced. 21 App. 547, 551 (6) (94 S. E. 846).

Where plaintiff sued for injuries to her entire tract of land, caused by poisonous chemicals from a fertilizer plant deposited in stream which ran through her land, it was not error to exclude evidence as to relative value of swamp land actually touched and affected by the polluted water, and high lands which constituted the remainder of plaintiff's farm. 21 App. 547, 552 (7) (94 S. E. 846).

Instruction to jury in action for injuries caused by pollution of stream that plaintiff claims and alleges that defendant company has permanently damaged her by lessening or destroying the market value of her land, because of the poisoning and contaminating or polluting of water in said stream and in her well of water and fish-pond, was not error. 21 App. 547, 553 (9) (94 S. E. 846).

Where, in action for injuries to tract of land caused by poisonous chemicals deposited in stream by fertilizer plant, court properly charged that measure of damages was difference between market value of land prior to erection and operation of the plant and market value after erection and operation of plant, it was not error to charge that plaintiff claimed and alleged that condition produced by defendant "has thereby lessened or absolutely destroyed the market value of plaintiff's premises and entire lands." 21 App. 547, 554 (10) (94 S. E. 846).

There was no such harmful error in instruction, in action for injuries to plaintiff's land caused by fertilizer plant depositing poisonous chemicals

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in stream running through such land, that "defendant denies this and alleges that plaintiff has not been damaged at all, or in a very small amount," as to require a reversal, in light of undisputed evidence as to certain elements of damage, such as destruction of fertility of adjacent land, of fencing, and of trees and other vegetation, and loss of certain live stock, caused by the poisoned water. 21 App. 547, 555 (11) (94 S. E. 846).

Riparian owner is one having land bounded on a stream of water, as such owner having a qualified property in the soil to the thread of the stream. 141/202, 207 (80 S. E. 785).

Charge that where non-navigable stream flows upon, through, and over the land of several persons, all of whom own land adjacent thereto, they all have equal rights in and to the

waters which flow or are contained in said stream, to such a stream, was not error. 21 App. 547, 555 (12) (94 S. E. 846).

Riparian rights are such as grow out of the ownership of the banks of streams, and not out of the ownership of the bed of the stream. 141/202, 207 (80 S. E. 785).

Stream: Where there was some testimony disclosing that there was a stream with well defined banks, between which waters flowed during a considerable portion of each year, court did not inaccurately refer to the body of water as a "stream." 21 App. 547, 557 (12) (94 S. E. 846).

Use: Ordinarily riparian proprietors may use the water for any purpose to which it can be beneficially applied, without material injury to the rights of others. 141/202, 206 (80 S. E. 785).

§ 4478. (§ 3882.) Right of way, etc.

Damages: Difference in market value of property with private way closed and with it opened measure of damages. 140/52 (2) (78 S. E. 465).

Evidence: to show market value of property before and after way was closed competent. 140/52 (3) (78 S. E. 465).

Obstruction: Where common lessor let two buildings, with alley between, to two tenants, with right in each to use alley for ingress and egress only, and one tenant transacted business of repairing vehicles in rear of his building, to which place access was ob-

tained by means of alley, and other tenant loaded and unloaded its express packages from side door opening on alley, petition by former tenant against latter, to recover damages for "Improper obstruction" of alley by loading and unloading wagons, does not set forth cause of action, in absence of specific allegations that defendant used and unreasonably obstructed alley for unreasonable time, to plaintiff's injury. 146/173 (1) (91 S. E. 24).

§ 4479. (§ 3883.) Slander of title.

Pleading: Plaintiff must allege and prove uttering and publishing of slanderous words, that they were false, that they were malicious, that he sustains special

damage thereby, and that he possessed estate in property slandered. 147/151 (93 S. E. 82).

§ 4480. (§ 3884.) Damage for continuous trespass.

Pleading: Where allegations in petition are sufficient to set out continuing trespass, sustaining of general demur-

rer constitutes error. 146/123 (2) (90 S. E. 860).

Injuries to personalty. General note on trover.

ARTICLE 2.

Of Injuries to Personalty Generally.

§ 4482. (§ 3886.) Mere possession.

Administrator: Where administrator lent money to estate represented by him, and certificate of stock was delivered to him as collateral security for note given for loan, and pledgor afterwards borrowed certificate to use as collateral security for another loan, agreeing to return it after that purpose had been served, and he refused to return it on demand as agreed, administrator could maintain bail-trover for recovery of certificate. 20 App. 674 (2) (93 S. E. 518).

Nonsuit: Where there was proof of possession by plaintiff and of interference

therewith by defendants, who had not been deprived wrongfully of property in dispute, and were not true owners thereof, court erred in awarding nonsuit. 19 App. 452 (2) (91 S. E. 910).

Title: Where plaintiff's testimony disclosed that she was in fact in possession of property after death of her husband, she was entitled to maintain her action for any interference with such possession except as against true owner or person wrongfully deprived of possession. 19 App. 452 (1) (91 S. E. 910).

§ 4483. (§ 3887.) Trover.

General Note on Trover.

Agent who takes another's property for his principal without owner's consent is guilty of conversion, though he acts in good faith, ignorant of true owner's title. 15 App. 747 (5) (84 S. E. 155).

Where evidence in trover suit shows that defendant was in possession of property in controversy as agent of another, transferee of such other could therefore maintain action to recover its possession against agent refusing to surrender. 147/379 (3) (94 S. E. 561).

Whoever meddles with another's property, whether as principal or agent, does so at his peril, and it makes no difference that he acts in good faith, nor, in case of agent, that he delivers property to his principal before receiving notice of claim of owner. 22 App. 471, 472 (1-b) (96 S. E. 341).

If agent takes property of another without his consent and delivers it to the principal, it is a conversion, and trover will lie for recovery of property or for damages, as plaintiff may elect. 22 App. 471, 472 (1-b) (96 S. E. 341).

Agent, who for and in behalf of his principal takes property of another without latter's consent, is as to him

guilty of conversion, although, being ignorant of true owner's title, agent may have acted in perfect good faith; such agent may be sued in trover for the property, even after delivery to principal. 22 App. 471, 472 (1-c) (96 S. E. 341).

Amount: General rule that plaintiff can not recover amount larger than he is using for, as shown by his pleadings, is applicable in trover proceedings. 20 App. 143 (1) (92 S. E. 775).

Answer: In trover, amendment to answer alleging certain wrongful acts of former owner of shares of stock alleged to have been transferred, but not showing cause of action against plaintiff or any defense to his demand, was properly stricken. 147/479 (1-a) (94 S. E. 561).

Automobile: Trover can not be maintained against sheriff by owner of automobile seized while conveying intoxicating liquors on public road or private way, while it is being lawfully held by sheriff in his official character as an arresting officer, pending condemnation proceedings or subsequently to judgment of court and pending sale. 23 App. 484 (1) (98 S. E. 505).

Where defendant sheriff had right of possession of automobile seized while conveying intoxicating liquors

General note on trover.

contrary to law, trover by the owner would not lie, as gist of action of trover is injury to right of possession. 23 App. 484, 485 (2) (98 S. E. 505).
Bailee may sue for property taken from his possession without warrant of law. 144/91 (86 S. E. 224).

Nonsuit properly awarded in action of trover for automobile retained by defendant for purpose of asserting his lien as a mechanic, where plaintiff denied that entire charge made by defendant was correct, but admitted that he had authorized certain part of the work to be done, which was of stated value, and that he had not paid or offered to pay this amount before instituting suit, and thus discharged lien of defendant for amount confessedly due. 21 App. 94 (94 S. E. 75).

Bailee, in action against him by bailor to recover property deposited with him, may set up as defense that property was taken from him upon legal process fair on its face, provided that bailee did not fail in any duty properly owing the bailor and that bailor, if not party to that proceeding, had been given full and ample notice thereof. 23 App. 307 (1) (98 S. E. 228).

Where sawmill and fixtures had been hired by plaintiff to defendant for indefinite period, before plaintiff can recover in action of trover, demand and refusal must be shown. 19 App. 476 (4) (91 S. E. 909).

Where bailee shows that suit for property had been instituted by a third person and that he promptly notified bailor thereof and was proceeding to defend right and claim of bailor, fact that he then proceeded, with knowledge of bailor, to surrender property to levying officer, in accordance with one of his options under the law in such cases, did not amount to conversion such as would render him liable in action of trover, but supported finding in bailee's favor that he had exercised degree of ordinary diligence required of him. 23 App. 307 (1) (98 S. E. 228).

Bankrupt: Discharge in bankruptcy is not a defense to an action of trover, brought by a seller against the bankrupt to recover personal property sold

to the bankrupt under a contract retaining title until payment, where the purchaser has retained possession after such discharge. 141/313 (1) (80 S. E. 993).

This is true although plaintiff may at the trial exercise his statutory privilege of electing to take a money verdict. *Id.* 313 (2).

Burden of proof is on plaintiff to prove not only title but also right of possession where he has by contract surrendered possession to another. 13 App. 759 (79 S. E. 927).

Carrier: Where carrier agreed to forward package to certain point, but sent it elsewhere and delivered it to transfer company which claimed storage charges and subsequently delivered it to carrier for delivery to owner on payment of such charges, owner could maintain trover against carrier upon refusal to deliver package without payment of such charges. 141/708 (1) (81 S. E. 1114).

Where inferior animals are substituted during transportation for those shipped conversion by carrier may be presumed. 14 App. 767 (2) (82 S. E. 465).

Question whether carrier's explanation was sufficient to negative wrongful conversion and gross or wanton negligence on its part was for jury. *Id.*

Where goods shipped to shipper's order are delivered by carrier to another without production of bill of lading, delivery is at carrier's risk and may subject carrier to suit in trover. 15 App. 142 (2-c) (82 S. E. 784).

Where it appeared that freight had not been paid, error to give charge authorizing jury to find for plaintiff freight charged in addition to value of goods shipped. *Id.* 142, 143 (9).

Instructions here on mitigation of damages were not objectionable. *Id.* 142, 143 (10).

Instruction authorizing jury to find for plaintiff for damages done to goods after conversion was erroneous. *Id.* 142, 143 (11).

Charge, "If you find for the plaintiff, your verdict will be, 'We, the jury, find in favor of the plaintiff' so many

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dollars and cents, and so much hire," was erroneously given. 14 App. 5 (2) (80 S. E. 21).

Chattel mortgage will not support trover. 17 App. 666 (1) (87 S. E. 1100).

Instrument providing that if described debts should be paid at maturity, "then this deed or bill of sale to be void," being in legal effect chattel mortgage, was not adequate to support trover. Id. 666, 667 (3).

Conditional sale: Plaintiff was not entitled to recover value of property sued for without surrendering, or offering to surrender, order-contract and notes given by defendant for price of property. 17 App. 467, 468 (5) (87 S. E. 689).

Purchaser here under contract for sale of piano on installments could not, by sale, transfer title where all installments were not paid, and sale by him amounted to conversion. 145/671 (89 S. E. 715).

When personal property is sold, and seller retains title as security for purchase money, and indebtedness matures in installments, he may proceed to rescind sale and to recover possession of property as soon as any of the installments become due and remain unpaid. 19 App. 159 (2) (91 S. E. 233).

Direction of verdict for plaintiff in trover for mule was error, where from evidence it appeared that he based his claim on purchase of mule from defendants under duly recorded contract reserving title until payment of price, which became due one day after date and was never fully paid, that he soon voluntarily abandoned the mule and left it to starve, and that his wife, being unable to care for or feed it, took it to a third person, who, having nothing to feed it with, allowed vendors to take possession of it. 22 App. 162 (95 S. E. 762).

Conspiracy: If two persons conspire to steal certain personalty, and one of them actually commits the larceny while the other is present aiding the theft in pursuance of the conspiracy, both are liable in trover, though the abettor never took actual possession of the property. 140/617 (2) (79 S. E. 468).

Contract: Where plaintiff elected to sue in trover instead of contract, error to admit written contract in evidence for any purpose other than to show title in plaintiff. 17 App. 467 (2) (87 S. E. 689).

Any special terms of contract which might affect rights of parties if suit had been to enforce contract could not be considered. Id. 467 (2-a).

Charging that under contract, if defendant retained property for \$300 without rejecting it he was bound to pay for same, was error, as plaintiff could not enlarge his action by terms of contract. Id. 467, 468 (4).

Conversion: Trover lies only when there had been a conversion, and proof that possession of defendant is not wrongful defeats the action. 13 App. 456 (3) (79 S. E. 235).

Any distinct act of dominion, inconsistent with owner's right, wrongfully exercised over property by another, may amount to conversion, whether dominion was exercised for wrong-doer's own use or for use of third person. 15 App. 142 (2-b) (82 S. E. 784).

Any act of defendant which negatives or is inconsistent with plaintiff's right of property and possession is conversion. 15 App. 678, 679 (5) (84 S. E. 165).

Nonsuit properly awarded where there is no proof of actual conversion or that defendant was in possession when action was brought. 17 App. 290 (86 S. E. 643).

Fact that possession of stolen property, unlawful as against true owner, may have been acquired in good faith will not prevent such possession from operating as a conversion against the true owner. 21 App. 810 (1) (95 S. E. 316).

In trover conversion is the gist of the action. 19 App. 476, 477 (5) (91 S. E. 909).

While demand to surrender property and refusal is necessary to maintenance of action in trover where property came into defendant's hands lawfully, unless it otherwise affirmatively appears that there was an actual conversion prior to suit, it is rule, ordinarily, that no such demand and re-

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fusal need be shown to prove conversion where defendant is in possession of property when action is brought. 21 App. 810 (1) (95 S. E. 316).

Plaintiff in trover suit must show conversion on part of defendant, and refusal to surrender the property on demand does not constitute conversion, but is evidence thereof. 21 App. 810 (1) (95 S. E. 316).

Where title to property is shown to be in plaintiff, proof of demand for it by him on defendant, and of refusal to deliver by defendant, makes *prima facie* a case of conversion. 22 App. 404 (2) (95 S. E. 1001).

Costs: Where defendant is in possession at time suit is entered, proof of demand and refusal is necessary only to save plaintiff costs of court in case defendant should disclaim title to property. 18 App. 448, 449 (1-a) (89 S. E. 536).

Claimant, whose claim was dismissed and who took no appeal to jury in superior court and who did not pay costs, could not bring trover against constable. 19 App. 520 (91 S. E. 919).

Cropper: Contract here under which party was to raise and deliver seed grown on certain land to be selected by the other party to the contract, whereby such other party was to loan sacks and furnish seed and was to pay a certain amount per pound for all seed grown found to be fit and suitable for seedman's use, was a contract for work and labor. 22 App. 753, 754 (4) (97 S. E. 251).

Where person left certain number of stalks of sugar-cane in a bed, and another person, without consent of owner, took up the cane and planted it, and parties agreed that cane should be cultivated by one planting it, and that owner could get one-half of it in the fall, trover would not lie against person who planted it for certain number of stalks raised on patch grown by him, where there had been no segregation of such stalks from whole amount raised, so as to render same subject to identification. 19 App. 479 (1) (91 S. E. 789).

Custody of law: Trover does not lie in case of property in *custodia legis*. 23 App. 484 (1) (98 S. E. 505).

Deliver: Mere offer to deliver constitutes no defense to action for conversion of shipment of goods. 15 App. 142, 143 (8) (82 S. E. 784).

Mere offer to deliver will not ordinarily mitigate damages. *Id.*

Demand: Where defendant alleged ownership and admitted refusal to deliver, plaintiffs need not prove demand and refusal. 144/118 (1) (86 S. E. 219).

Where defendant was in possession, claiming title, at time of action, no demand was necessary as condition precedent to suing for property sold under conditional sale contract. 15 App. 678, 679 (5) (84 S. E. 165).

Purpose of demand in trover suit is to furnish evidence of conversion. *Id.*

Where defendant struck all admissions from his answer, burden was on plaintiff to show demand and refusal, or conversion, by defendant. 17 App. 529 (1) (87 S. E. 808).

Where title and right of possession of property was in plaintiff, and demand was made therefor and refused, verdict for defendant was contrary to law. 17 App. 652 (88 S. E. 33).

In action of trover, where it appeared that defendant was in possession of property as bailee of third person, claiming adversely to plaintiff, unnecessary to prove demand for property and refusal to surrender before institution of suit. 145/798 (1) (89 S. E. 838).

Demand by plaintiff for machine sold to defendant was not necessary before action of trover therefor where title was retained in vendor until full payment of price and defendant refused to pay agreed price in full, contending that property was worthless to him. 23 App. 422 (1) (98 S. E. 365).

Depositaries for hire: Good defense to action in trover that defendant holds property as depositary for hire and has not been paid. 13 App. 456 (2) (79 S. E. 235).

Description here in petition of certain machinery used in the manufacture of ice was sufficiently definite. 13 App. 574 (1) (79 S. E. 526).

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Where action is designed to recover specific chattels rather than damages for conversion, and pleader evidences this design by supplementing action with bail proceedings, he must describe chattels with sufficient particularity to identify them for seizure. 16 App. 645 (1) (85 S. E. 953).

Same particularity of description in action of trover is not essential as is requisite in detinue. *Id.*

Dwelling house: Trover will lie to recover dwelling house which was detached from land under circumstances stated, although subsequently, but before bringing suit, it was attached to land of wrong-doer. 149/61 (2) (99 S. E. 27); 23 App. 724 (1) (99 S. E. 318).

Equity: Trover will not lie to recover possession of deed executed to defendant, or of non-negotiable notes and certificates of deposit payable to defendant, upon ground that such writings were improperly taken in the name of defendant when they should have been executed to plaintiff; plaintiff's remedy, if any, lay in a proceeding in equity. 13 App. 583 (1) (79 S. E. 483).

Evidence in an action for the conversion of gin machinery held here to sustain verdict for plaintiff. 141/429 (4) (81 S. E. 225).

Evidence, in trover against trustee in bankruptcy of dealer from whom plaintiff purchased vehicles which he sought to recover, held too indefinite to show sale of any particular vehicle. 144/737 (1) (87 S. E. 1021).

Evidence that defendant, member of a firm succeeded by plaintiffs, had exchanged horse sued for for another horse, which firm accepted, and that when plaintiffs came into possession of assets the firm had parted with title to the horse, demanded verdict for defendant. 13 App. 254 (79 S. E. 84).

Evidence in trover to recover certain promissory notes held to sustain verdict for defendant. 13 App. 759 (79 S. E. 927).

Defendant in trover, who has failed to file issuable defense, can cross-examine witness only as to value of property, and can not contest plaintiff's title or right of possession. 16 App. 546 (2) (85 S. E. 787).

Where trover was brought against three named persons to recover mare which plaintiff had swapped to a fourth person for a mule, court erred in refusing to rule out plaintiff's evidence to effect that such fourth person had represented the mule to be sound in every respect, no evidence having been introduced that connected defendants with such transaction, and such fourth person's representation not having been made in their presence. 21 App. 103 (1) (93 S. E. 1029).

Suit against husband and wife for purchase price of piano, dismissed as to wife, on general demurrer, did not constitute election to recognize title to piano in her, and record of such suit was properly excluded in trover against her for such piano. 22 App. 728, 729 (2) (97 S. E. 197).

Where evidence in suit to recover cotton possibly authorized, but did not demand, finding that the amount sued for was in possession of defendants at or before time suit was brought, direction of verdict for plaintiff was error. 18 App. 158 (2) (88 S. E. 992).

Fraud: Party to horse trade can repudiate contract for fraud and bring trover to recover horse traded by him only where fraud is actual. 143/376 (1) (85 S. E. 100).

Representation that horse was sound when in fact its lungs were diseased did not constitute actual fraud. *Id.* 376 (2).

Statement by third person in plaintiff's presence, in reply to defendant's question as to whether defendant's horse was sound, "You are aware of the wire cut on her leg," without saying more, was a representation that, except for the wire cut, horse was sound. *Id.* 376 (2).

Party alleged to have been defrauded in horse swap by means of fraudulent representations can not maintain trover, although he promptly repudiated contract and offered to return animal and note, which had been given at "boot," and demanded return of other animal, where, after offer to rescind had been refused, and after trover suit had been filed, he placed note in bank as collateral se-

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curity for his indebtedness to the bank, and at maturity of note instructed bank cashier to collect it from defendant and to credit proceeds on his indebtedness to the bank, which was done. 20 App. 233 (1) (92 S. E. 954)

Joint recovery: Though rent note was executed to husband alone, recovery by husband and wife for conversion of cotton delivered in payment of rent due on land owned by both was authorized. 13 App. 29 (78 S. E. 686).

Justice court: Suit against railroad company for shipment not delivered to consignee is one for conversion, and without jurisdiction of justice of peace. 17 App. 52 (86 S. E. 258).

Landlord: Petition as amended here was fatally defective for reason that it contained no allegation that property had been sold by cropper without landlord's consent. 17 App. 469, 470 (3) (87 S. E. 692).

As landlord holds lien for rent on all crops raised by tenants on premises rented for part of crop, trover against landlord can not be maintained by third party claiming under contract with tenant to recover crops raised by tenant and delivered to landlord in payment of rent, until landlord's lien has been discharged. 24 App. 387 (3) (100 S. E. 775).

Levy: Property in possession of a levying officer under lawful process can not, upon dismissal of possessory warrant proceedings, be recovered from the officer in an action of trover brought by the person at whose instance process was issued. 13 App. 786 (80 S. E. 30).

Money: To authorize money verdict in trover there must be some evidence of value of personalty converted. 14 App. 5 (1) (80 S. E. 21); 15 App. 678 (1) (84 S. E. 165); 17 App. 778 (88 S. E. 685).

Where, in trover suit, plaintiff elects to take money verdict, he is privileged to recover highest proved value between date of such conversion and date of trial; and even though there be no demand to surrender property and refusal, plaintiff is not limited to highest proved value between time when suit was brought

and date of the trial. 21 App. 810 (1) (95 S. E. 316).

Mortgage: Where mortgage fi. fa. in favor of guano company and distress warrant in favor of another plaintiff were levied upon cotton found in warehouse of gin company, and levy of distress warrant was met by claim filed by person who gave claim bond and forthcoming bond, which levying officer accepted, and levy of mortgage fi. fa. was not arrested by any proceeding, and cotton levied on was sold, but sheriff was unable to deliver same for reason that it had been removed from warehouse without authority from the guano company, plaintiff in mortgage fi. fa. or levying officer, court did not err in directing verdict for the gin company. 21 App. 585 (94 S. E. 814).

Nonfeasance: There must be some act of malfeasance, not more nonfeasance, some positive wrong, and not the mere omission of what is right; mere neglect of duty will not support an action of trover. 19 App. 476, 477 (5) (91 S. E. 909).

Note: Bank holding note can not come into court holding on to both an old and a renewal note and claiming title to and liability under each, even though it be willing to renounce its claim upon the former after receiving back the latter; nor can it compel return of property sued for, while renouncing for itself the agreement by which it claims the note and stock were delivered. 21 App. 608 (94 S. E. 837).

Seller of personal property on credit may take note for purchase price and retain, as security for debt, legal title to property so sold, and in same instrument, to better secure debt, title to other personal property may be passed by purchaser, and, where note is not paid when due, seller may recover property in trover; when vendor elects to take money verdict purchaser is entitled to credit for such sums of money as may have been paid upon note. 24 App. 416 (1) (100 S. E. 779).

Where one sells personal property, taking purchase money note reserving title in property, until note is paid,

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holder of note may recover property in trover, upon failure of maker of note to pay same. 149/157 (1) (99 S. E. 289); 24 App. 3 (1) (99 S. E. 475).

Object of suit of trover is the recovery of specific property claimed, or its equivalent in money. 20 App. 95, 96 (1-b) (92 S. E. 546).

Partnership: Trover will not lie where title to property rests in partnership, and plaintiff's interest therein can not be determined until a full partnership accounting has been had. 13 App. 518 (2) (79 S. E. 484).

Petition filed by receiver to recover lumber or its value here was sufficient to state cause of action. 142/813 (83 S. E. 937).

Demurrer, in shipper's action for conversion against last of several connecting carriers, was properly overruled here. 15 App. 142, 143 (5) (82 S. E. 784).

Paragraph of petition in action for conversion of certain stone alleging that, because of cost of quarrying and hauling, stone was worth to petitioner sum greater than its market value, was not subject to motion to strike. 16 App. 834 (1) (86 S. E. 651).

Petition did not state cause of action, where it did not allege that title or right of possession was not in defendant, but that plaintiff had either title or right of possession. 17 App. 469 (1) (87 S. E. 692).

Where, in trover suit, there is no specific *ad damnum* clause in the conclusion of the declaration, and prayer is that process issue, require the defendants to be and appear at the next term of court to answer the complaint, amount of damages asked for will be construed to be alleged value of property sued for. 20 App. 143 (2) (92 S. E. 775).

Petition here in trover was properly dismissed, on general demurrer. 24 App. 642 (101 S. E. 718).

Petition in trover setting out description of property, its value, title thereto in plaintiff, possession in defendant, and refusal by latter to deliver property to plaintiff or to pay him profits thereof, was not subject

to general demurrer. 18 App. 269 (1) (89 S. E. 347).

Possession, with claim of title adverse to true owner, is sufficient to constitute conversion. 15 App. 678, 679 (5) (84 S. E. 165).

Evidence of plaintiff here made out *prima facie* case entitling him to recover against defendant relying solely on fact that when suit was brought he was in possession. 16 App. 550 (1) (85 S. E. 823).

Judgment for plaintiff was unauthorized where there was no evidence that identical property sued for had been in defendant's possession. 16 App. 645 (3) (85 S. E. 953).

Evidence that goods shipped under contract were not same as those bought by defendant was admissible, and also on question whether defendant was in possession of particular property sued for. 17 App. 467 (3) (87 S. E. 689).

Evidence that defendant had received personalty sued for created presumption that he was still in possession thereof. 17 App. 669, 670 (2) (87 S. E. 1097).

Trover to recover property lies against whomsoever may be found in possession of it. 22 App. 728, 729 (3) (97 S. E. 197).

In some cases, to recover in trover, it is essential that plaintiff show both title and right of possession; in such cases, although plaintiff may show that he has legal title, if it appears that defendant is rightfully entitled to possession, verdict for defendant is demanded. 23 App. 484, 485 (2) (98 S. E. 505).

Where it does not appear that either title or right of possession was in plaintiff, who, as guardian of minor son, sought to recover automobile sold by him to another, which she testified she had bought for him and for which he gave his notes indorsed by her, verdict for defendant was proper. 24 App. 715 (102 S. E. 38).

Where evidence in trover demanded finding that title to property sued for and right of possession were in plaintiff, and undisputed evidence showed that property was in possession of defendant when suit was filed, and that

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demand was made upon defendant by plaintiff before filing suit, and that such demand was refused, verdict for plaintiff was demanded, and verdict for defendant was contrary to law and to the evidence. 18 App. 57 (2) (88 S. E. 903).

See Automobile.

Sale: Attempted sale of personal property to "corporation" not yet in existence, made to individual who claims to be agent but who gives his individual notes for purchase price, and who signs individual name to retention-of-title contract, is in law sale to individual, and vendor, by suit in trover, can recover property or value from innocent third person who had possession and who purchased at sheriff's sale, goods having been sole as property of corporation not in existence. 19 App. 706 (2) (91 S. E. 1062).

Where contract is one for executory sale of merchandise, action of trover will not lie against third person purchasing from vendor. 22 App. 753, 754 (4) (97 S. E. 251).

Where personal property is sold upon express condition that sale is for cash, but that buyer is to have three or four days after delivery to examine shipment, and, if correct to remit for it, and, if not correct, to return it immediately, and property is delivered on faith that condition will be immediately performed, and performance is refused upon demand in reasonable time, or property is actually converted by buyer, no title passes to him, and trover will lie to recover the goods or their equivalent in money. 18 App. 267 (1) (89 S. E. 374).

Where, in suit on open account for purchase price of personalty, defendant entered only defense that goods purchased were worthless, finding for defendant precluded maintenance of subsequent action in trover for recovery of same property. 20 App. 267 (92 S. E. 1012).

Security: One who holds personalty as security for a debt may maintain trover for its recovery from one who wrongfully withholds possession. 13 App. 450 (3) (79 S. E. 355).

Tender: See § 4494 and notes.

Timber when felled, cut, and stacked in cord-wood becomes personalty, and does not pass as part of realty upon sale of land upon which it lies; title to cord-wood remained in vendor of land and he could recover such wood from purchaser of land in action of trover. 23 App. 358 (1) (98 S. E. 237).

Positive and uncontradicted testimony that title to cord-wood stacked on land was at time of sale of land in the vendor was not negatived by evidence that there was a tenant house on the place, even if such evidence authorized inference that land was occupied by tenant having right to cut and gather firewood, and it was not error to rule out such latter evidence. 23 App. 358 (2) (98 S. E. 237).

Title: Transfer on back of note, containing reservation of title to property therein described, "for value received we hereby transfer and assign all the right, title, and interest we have in the within note, together with the security mentioned in said note, to," etc., and dated and signed, was sufficient to pass title to both note and property and sufficient to support action of trover for the latter's recovery. 13 App. 574 (3) (79 S. E. 526).

Nominal plaintiff's ownership of chattel is sufficiently established, if it is shown that title is in fact in usee, for whose benefit action was brought. 16 App. 546 (3) (85 S. E. 787).

Where pleading did not raise question, court properly excluded evidence that bill of sale relied on to show title in plaintiff was without consideration. 17 App. 533 (1) (87 S. E. 809).

Evidence here in trover to recover mare, as to title of plaintiff, was insufficient to sustain judgment for plaintiff. 17 App. 778 (88 S. E. 692).

Where trover was instituted against common carrier while in possession of goods, and on day of institution of suit petition was duly served on such carrier, this was sufficient notice of title of plaintiff, and fact that consignor of goods was not true owner. 145/798, 799 (3-a) (89 S. E. 838).

Injuries to personalty.

Exclusion of evidence relating to number and amount of payments made upon land of plaintiff, upon which was grown crop sued for in trover, was not error, where it was admitted by defendant that bond for title and remaining notes for purchase of land had been surrendered by agreement between the parties in 1913, and action related to crops produced on land in 1914. 19 App. 132 (1) (91 S. E. 234).

While mere right of possession of personal property, even if holder has no valid title to it, gives him right to maintain suit in trover against wrongdoer who has deprived him of that possession, yet where plaintiff relies on his title to recover possession of property, and his evidence shows that paramount outstanding title is in third person, he can not recover. 19 App. 393 (1) (91 S. E. 515).

The issue in an action of trover is ordinarily one of title. 20 App. 95, 96 (1-b) (92 S. E. 546).

It is only incumbent on plaintiff in trover to show his title, conversion by defendant, and, where he elects to take money judgment, value of the property. 20 App. 95, 96 (1-b) (92 S. E. 546).

To maintain action of trover, plaintiff must show title in himself, or right of possession wrongfully withheld from him by defendant. 21 App. 615 (3) (94 S. E. 827).

One bringing suit to recover personal property has burden of showing title thereto. 22 App. 10 (1) (95 S. E. 319).

Where, according to the evidence, sale of plaintiff's car to defendant was not authorized or ratified by plaintiff, plaintiff was entitled to recover the car. 22 App. 686 (97 S. E. 89).

Value: Where suit is brought for property and not for its value, but value is alleged in declaration, it need not be proven. 15 App. 678 (1) (84 S. E. 165).

Where articles of different kinds are sued for, value of each or aggregate value of all should be alleged. 16 App. 645 (2) (85 S. E. 953).

§ 4484. Defenses in trover cases.

Counterclaim: In action to recover specific chattels, no counterclaim is pos-

Refusal to dismiss petition in trover which failed to allege any value was not error, in absence of special demurrer. *Id.*

Where, in trover action, plaintiff chooses as his form of recovery the highest proved value of the property between the time of conversion and the date of the trial, the amount of the recovery is limited to the value laid in the petition. 21 App. 810 (2) (95 S. E. 316).

It was error to charge that plaintiff had elected to take money verdict, and that if jury found that he was entitled to recover, they would be authorized to find the highest proven value of the property, the highest proved value having reference to time prior to the conversion, without any proof of continuance of such value subsequent thereto, and the evidence submitted as to value between the date of conversion and trial not being such as would demand finding equal in amount to verdict rendered. 21 App. 810 (4) (95 S. E. 316).

Where plaintiff in trover elects to take money verdict, nonsuit is properly awarded where there is no proof of value of property. 24 App. 170 (1) (100 S. E. 226).

Defendant in trover wherein plaintiff elects to take money verdict, by giving of replevy bond, which is required to be in double the amount sworn to by plaintiff as to value of property in latter's application for bail, does not admit value of property, and such bond is not prima facie evidence of such value. 24 App. 170 (1) (100 S. E. 226).

Agreed price of property as stated in contract of sale is not evidence of value of property in trover suit against one who was not party to contract. 24 App. 170 (2) (100 S. E. 226).

Waiver: Institution of suit in trover against last of several connecting carriers was not of itself waiver of bailment. 15 App. 142, 143 (5) (82 S. E. 784).

sible, unless, perhaps, equitable relief may be awarded under some very ex-

Of defenses; of justification.

ceptional circumstances. 23 App. 731 (1) (99 S. E. 314).

Money judgment: Where seller of personal property brings trover against one not original purchaser, to recover property or its value, money judgment therein is not a judgment for purchase money. 148/770 (2) (98 S. E. 270, 43 A. B. Rep. 125).

Recoupment: In action of trover, recoupment in nature of damages can not be pleaded by defendant, nor adjudicated, unless some special equity, such as non-residents or insolvency of plaintiff, is shown. 23 App. 731 (2) (99 S. E. 314).

Sale: Amendment to answer in trover, alleging that plaintiff's agent had tried to induce defendant to buy piano and she refused to do so, and

§ 4485. (§ 3888.) **Trespass.**

Levy upon property other than that of defendant, under execution founded on general judgment, does not render levying officer liable, as trespasser, to owner of property, where defendant

that without her knowledge and consent he persuaded her husband to sign contracts for purchase of piano in question and to give to plaintiff a piano that she owned, and that she immediately notified plaintiff to return her piano and to take the other piano, and plaintiff refused to do so, and that plaintiff was not entitled to recover piano sued for until return of her piano or its value, constituted no defense. 22 App. 728, 729 (4) (97 S. E. 197).

Where two persons sign purchase money notes as purchasers, but one of them fails to pay any of the purchase money, purchaser of property from one who has paid nothing would acquire no equity as against original vendor. 24 App. 474 (2) (101 S. E. 396).

in *fi. fa.* is in possession of property at time of levy, and where no circumstance appears that would suggest reasonable doubt of defendant's ownership. 20 App. 595 (93 S. E. 224).

CHAPTER 4.

Of Defenses.

ARTICLE 1.

Of Justification.

§ 4488. (§ 3891.) **Justification in torts.**

Charge that plaintiff was entitled to recover for death of husband, unless killing was justifiable or excusable

was proper under this section. 144/758, 759 (5) (87 S. E. 1067).

§ 4489. (§ 3892.) **Extenuation.**

Homicide: Wife suing for criminal killing of husband can recover full value of his life, although recovery

may be diminished according to fault of husband. 144/62, 63 (3) (86 S. E. 248).

§ 4490. (§ 3893.) **Consent.**

Charge: Where defendant city in an action by a property owner to recover for damages caused by alter-

ing grade of street, pleaded that the grade had been changed with consent of plaintiff, court not required

Of satisfaction, and herein of tender.

to charge this section, in absence of appropriate written request. 18 App. 321, 322 (6) (79 S. E. 36).

Court correctly charged that plaintiff would have to be in possession of

all the facts and know the condition in which the municipal improvement would leave his property, before he would be bound by his consent in the improvement. Id. 321, 322 (7).

ARTICLE 2.

Of Satisfaction, and Herein of Tender.

§ 4491. (§ 3894.) Satisfaction of torts.

Fraud: Where company sued for personal injuries pleads that plaintiff released company in consideration of draft on its treasurer for stated amount, as an accord and satisfaction, it is competent for plaintiff to allege and prove that release was procured by fraud and at a time when he was not mentally capacitated to contract, and that he did not collect the draft, but tendered it back before suit, and made a continuing tender of the unpaid draft. 19 App. 544 (2) (91 S. E. 1001).

Guilty: Note given for no other purpose than to suppress criminal prosecution is void for want of consideration, whether accused person be innocent or guilty. 18 App. 52 (1) (88 S. E. 824).

Jury: Question whether particular note was given merely to settle criminal prosecution, or upon another and different consideration, presents issue of fact for jury. 18 App. 52 (2) (88 S. E. 824).

Mortgage given to suppress criminal prosecution is void. 140/39, 41 (78 S. E. 460).

It was error to refuse to allow amendment to affidavit of illegality which had been interposed to foreclosure of chattel mortgage, where amendment set up that money, payment of which was secured by mortgage note, was obtained at instance of original payees for sole purpose of securing dismissal of criminal warrant charging nephew of maker with cheating and swindling. 18 App. 52 (3) (88 S. E. 824).

Evidence here did not authorize verdict in favor of affidavit of illegality, based upon ground that mortgage was

given in settlement of criminal prosecution. 22 App. 40 (95 S. E. 371).

Personal injuries: Where injured person has been induced by fraud to sign release, tender back of consideration received by him is condition precedent to his right to sue for injury. 141/743 (2) (82 S. E. 139).

Where person injured by train signed release in consideration of certain amount, tender of consideration to railroad company's local agent, who had no authority to accept tender, was not sufficient tender to entitle the injured person to avoid release. Id. 743 (3).

Evidence here in action by passenger for injuries sustained finding that minds of parties did not meet in execution of release set up by defendant. 15 App. 831 (1) (84 S. E. 323).

Return or tender of money received by plaintiff, not in satisfaction of claim or in consideration of release fraudulently procured, was not condition precedent to right to sue. 15 App. 831 (2) (84 S. E. 323), 842 (2) (84 S. E. 316).

Where release from damages for personal injuries does not appear in record, and consideration moving plaintiff to execute same is alleged to be other than and distinct from certain wages paid him for lost time, reviewing court can not say that return of amount so paid as wages was essential prerequisite to bringing of action for damages. 18 App. 257 (89 S. E. 301).

Principle of law that before party to contract may rescind for fraud, he must pay back or tender any valuable

Limitation of actions.

consideration received under terms of contract, applies to action for personal injuries, brought under Federal employer's liability act, where plaintiff, after infliction of injury sued for,

signed, for valuable consideration, contract releasing defendant from all liability therefor. 24 App. 686 (102 S. E. 146).

§ 4494. (§ 3897.) **Tender in trover.**

Cited. 20 App. 42, 48 (92 S. E. 402).

Conditional tender: Tender must be unconditional. 15 App. 142, 143 (8) (82 S. E. 784).

Costs: Where defendant is in possession at time suit is entered, proof of demand and refusal is necessary only to save plaintiff costs of court in case defendant should disclaim title to property. 18 App. 448, 449 (1-a) (89 S. E. 536).

Mortgage: Judgment for property sued for may be rendered in trover in favor of one claiming title under mortgagor and against a mortgagee in possession, without tender of amount due on mortgage, such a recovery being in

fact subject to the mortgagee's right of foreclosure. 20 App. 95, 96 (2) (92 S. E. 546).

Property embraced: Tender must embrace all property claimed by plaintiff. 15 App. 142, 143 (8) (82 S. E. 784).

Time: Defendant was not precluded from setting up by amendment after first term tender of property to plaintiff and tender of reasonable hire thereof, or from alleging that same had no value and from disclaiming title, though under this section it was too late for any tender to relieve him from costs. 17 App. 529 (1) (87 S. E. 808).

ARTICLE 3.

Limitation of Actions.

§ 4495. (§ 3898.) **For damages to realty.**

Cited. 143/497, 506 (85 S. E. 742).

Stated. 141/701 (1) (81 S. E. 1110).

Continuing trespass: Where petition for permanent injury to land was not filed until August, 1914, and last of alleged acts of trespass was committed in 1909, action was barred by statute of limitations. 22 App. 572, 573 (3) (96 S. E. 570).

Corporate stock: Action for damages for fraudulent representations and concealment in sale of worthless stock in corporation never legally organized

is governed by this section and section 4496. 144/26 (1) (85 S. E. 1028).

Nuisance: Prescription does not run in favor of maintenance of continuing nuisance, though damages can not be recovered further back than four years from bringing of suit. 140/713, 714 (3) (79 S. E. 850).

Right of way: Action of trespass brought against railroad corporation in 1911 for appropriating land for right of way in 1901, was barred by limitations. 141/701 (2) (81 S. E. 1110).

§ 4496. (§ 3899.) **To personalty.**

Cited. 143/497, 506 (85 S. E. 742).

Dismissal: Where petition showed upon its face that the cause of action was barred by limitations, court did not err in dismissing the action. 18 App. 84 (88 S. E. 905).

Fraud and deceit: Action for damages for fraudulent representations and concealment in sale of worthless shares of stock in corporation never legally organized is governed by this section and section 4495. 144/26 (1) (85 S. E. 1028).

Of other defenses.

§ 4497. (§ 3900.) **To the person.**

Cited. 143/497, 507 (85 S. E. 742);
19 App. 94 (90 S. E. 1040).

Stated. 15 App. 332, 333 (1) (83 S. E. 160).

Computation: Action brought October 24, 1893, for injuries sustained October 24, 1891, was barred by this section. 15 App. 332, 333 (2) (83 S. E. 160).

Dismissal: That plaintiff, within two years after accrual of right of action for death of her husband, sued in United States court, and voluntarily dismissed suit more than two years after accrual, and then within six months sued in city court, did not avoid bar of limitations. 17 App. 638 (1) (87 S. E. 908).

Federal Employer's Liability Act: Cause of action for damages for death under Federal employer's liability act accrues when administrator is appointed, and not at time of death, within meaning of section providing that no action shall be maintained unless commenced within two years from day cause of action accrued. 24 App. 750 (2) (102 S. E. 186).

Fraud and deceit: Allegations of fraud are insufficient to toll the statute, where it is not alleged that if usual and reasonable diligence had been exercised, alleged fraud could have been discovered, nor that defendant (an attorney who had received claims against plaintiff, for collection) was under ob-

ligation to disclose to him anything that defendant had done affecting rights of defendant's clients, and there being no allegation showing any fraudulent concealment, and the suit being based upon the libel and not upon alleged fraud. 18 App. 662 (4) (90 S. E. 359).

Homicide of husband: Suit by widow to recover for negligent homicide of her husband must be brought within two years from accrual of right of action. 20 App. 251 (2) (92 S. E. 1025).

Libel: Action for libel is barred, where time of alleged libelous communication was on or about March 8, 1914, and writ was filed on September 30, 1915. 18 App. 662 (1, 2) (90 S. E. 359).

In cases affecting reputation right of action accrues to plaintiff on the doing of the act by which the reputation is injured, and fact that plaintiff was ignorant of the act does not toll the statute. 18 App. 662 (3) (90 S. E. 359).

Municipal corporations: Under sections 910, 4497, action against municipal corporation for injuries occurring December 23, 1912, may be begun December 28, 1914, where claim was not presented until December, 1914, and was then rejected, the two-year limitation being tolled by the provisions for presentation of claim. 145/440 (3) (89 S. E. 423).

ARTICLE 4.

Of Other Defenses.

§ 4500. (§ 3903.) **Former recovery, etc.**

Cited. 17 App. 58, 59 (3) (86 S. E. 278).

Election between action ex contractu and action ex delicto: See notes to § 4407.

Former recovery: See notes to § 4335.

Pendency of former suit: See notes to § 4331.

Of damages.

CHAPTER 5.

Of Damages.

§ 4502. (§ 3905.) General rule.

Cited. 143/497, 502 (85 S. E. 742);
18 App. 226, 229 (89 S. E. 495).

Amount of damages: A verdict for \$1,000 can not be sustained as merely nominal damages. 21 App. 50, 51 (3) (93 S. E. 547).

Building: Where damages sought were for injury to house and not to land on which situated, jury should have been instructed that proper measure of damages was amount necessary to restore building to its condition before injury was inflicted. 18 App. 253 (2) (89 S. E. 530).

Charge: Where court charged as to degree of care child between five and six years old was bound to exercise at railroad crossing, it was not error to charge that if he was injured by negligence of railroad jury should determine whether such injury was temporary or permanent, and award him such damages as jury believed he was entitled to recover in either event. 142/13, 14 (2) (82 S. E. 225).

Instruction that jury need not consider whether when killed the cost of supporting child was equal to or greater than value of services rendered was not error, in view of charge that unless child could render services when killed plaintiff could not recover. 143/753 (3) (85 S. E. 920).

Failure of court in personal injury case to instruct on elements of damages pleaded but not proven was not error. 13 App. 386 (2) (79 S. E. 243).

Under evidence here not error to charge that plaintiff would be entitled to recover value of any services lost, though his employers had given him his wages during such time. 15 App. 369, 370 (2) (83 S. E. 445).

Charge that compensation allowable for pain and suffering rested with jury was not objectionable, as suggesting that jury find for permanent injuries. 15 App. 805 (3) (84 S. E. 144).

Charge in action for injuries to personalty that plaintiff could recover

its market value, qualified by instruction that damages should be such as would pay plaintiff for damage to his property, was not erroneous. 16 App. 635 (4) (85 S. E. 932).

It was inaccurate to charge that if plaintiff was entitled to recover at all he might recover for injuries sustained, then he might recover for lost time, then for doctor's bills incurred, then for damages done to automobile, and if injuries were permanent he would be entitled to recover for his decreased capacity to labor. 145/276, 277 (4) (88 S. E. 983).

Where trial judge charged correctly and clearly rule as to measure of damages for pain and suffering, and in connection therewith, and closely following, used expression that "measure" of damages is question for jury, it is manifest that court meant "amount," and such expression was not harmful. 146/200 (2) (91 S. E. 46).

Where, in action for damages, there is no contention that plaintiff, if entitled to recover at all, is not entitled to recover as much as the amount of verdict rendered in her favor, instruction of court upon measure of damages become immaterial; he who asserts that such error has been committed as requires new trial must not only designate the error, but also show that error worked to his injury. 18 App. 113, 114 (6) (88 S. E. 1003).

Where plaintiff was entitled to recover full value of cow, if entitled to recover at all, court did not err in failing to charge upon law as to nominal damage. 18 App. 648 (2) (90 S. E. 224).

Where there was no contention as to any element of damage or negligence except that set forth in petition and supported by some proof, there is no merit in ground of motion for new trial complaining of charge on ground that court failed to confine jury to ascertainment of precise damages al-

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leged in petition. 20 App. 550 (2) (93 S. E. 281).

Where, in action against railroad company, several different elements of damage are claimed, it is duty of court to explain to jury, with respect to each element, basis on which assessment of damages should be made; and where case is close on evidence or where amount of recovery is apparently excessive, new trial will be granted for failure of court to instruct as to rules of law for measuring element of damage set forth in petition and supported by evidence. 20 App. 786, 788 (5) (93 S. E. 533).

Instruction on measure of damages which is so incomplete as not to give jury any rule by which they can calculate the damages is erroneous. 21 App. 231 (4) (94 S. E. 50).

In action against city for personal injury from fall of sewer pipe on sidewalk, charge that damages are given as compensation for the injury, when it can be estimated in money, and that damages recoverable should be a fair compensation for injury done, substantially following this section, considered with entire charge, was not reversible error. 24 App. 411 (4) (101 S. E. 2).

See **Double damages, Earning capacity, Mental suffering, Mortality tables, Pain and suffering.**

Deceit: Charge in action for deceit that if jury should allow plaintiff to recover, they might increase amount he paid for his stock by a sum equivalent to interest, was erroneous as giving as measure of damages amount paid by plaintiff for the stock. 20 App. 540 (2) (93 S. E. 171).

Double damages: An owner of land alleged to have been injured can not have recovery of such character as to include double damages for same injury. 141/186 (3, 6-b) (80 S. E. 642).

Instruction authorizing plaintiff to recover for the injury and for the deformity that he sustained was erroneous, as authorizing double damages. 142/801 (2) (83 S. E. 943).

Earning capacity: Damages recoverable for permanent injuries to person should compensate for loss of money which he would probably earn had not

the injuries occurred. 143/93, 94 (5) (84 S. E. 434).

Under pleading and proof here not error to charge that jury could consider any reasonable prospect of increased earnings on part of plaintiff. *Id.*

In determining damages recoverable for loss of child's services during remainder of minority the probable future increase of earning capacity may be considered. 143/753 (3) (85 S. E. 920).

Charge which failed to call attention to, and require consideration of, fact that plaintiff's earning capacity would decrease in his declining years, was erroneous. 144/250, 252 (8) (86 S. E. 933).

Usual average earnings of injured person, where proof thereof is reasonably certain, may be shown as basis of recovery for loss of time. 14 App. 674 (2) (82 S. E. 166).

Evidence of compensation which injured party was receiving when injured is admissible on question of earning capacity. 15 App. 369, 370 (2) (83 S. E. 445).

Measure of damages for permanent injuries is the present cash value of loss by reason of decreased earning capacity. 145/522 (4) (89 S. E. 620).

Where it appeared that plaintiff lost his arm by reason of injury complained of and was unfitted for work of character which he had previously done, not error to admit evidence that since certain time preceding trial he had had no active employment, coupled with statement that he had attempted to get work during that period, but had been unable to do so. 145/647 (2) (89 S. E. 767).

In order to ascertain or form estimate as to diminished earning capacity of plaintiff in action for personal injuries, it is not essential that jury should have before them the standard mortality tables. 19 App. 336 (1) (91 S. E. 440).

Where there was merely a decrease, and not a total loss, of earning capacity of plaintiff in consequence of injuries complained of, court erred in giving in charge rule of damages applicable to total loss of earning capac-

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ity; error was not cured by writing off part of amount of damages awarded. 19 App. 370 (4) (91 S. E. 492).

Where, in action for personal injury, one of the elements of damages alleged was decrease of plaintiff's earning capacity, and he testified that for three years preceding injury he had satisfactorily served defendant as machinist, it was not error to allow him to testify further as to what usual and customary wages of expert machinist in the community at that kind of business were. 21 App. 603 (1) (94 S. E. 855).

Where, in suit for personal injuries, claim for future impaired earning capacity was one of the substantial issues made by pleadings and evidence, law relative thereto should have been given in charge to jury, without special request therefor. 24 App. 607 (1) (101 S. E. 758), 608 (1) (101 S. E. 714).

Where petition, after setting out alleged injuries, avers "that he now suffers from the same and will continue to suffer from the same as long as he lives * * * that on account of said injuries he has lost entirely his earnings since the date of said injury, and that his earning capacity is destroyed," and where evidence shows such physical injuries to plaintiff, from which jury may reasonably infer that plaintiff has been permanently or totally disabled and will continue so for any period of time, issue as to lost earning capacity, both partial and total, is presented. 24 App. 607 (2) (101 S. E. 758).

Where petition sets out petitioner's injuries and alleges that they are permanent, and that petitioner has become totally disabled, and where petition prays damages, as result of said injuries, for "lost capacity to labor and earn money," and where evidence shows such physical injuries to plaintiff, from which jury may reasonably infer that plaintiff had been permanently or totally disabled and will continue so for any period of time, issue as to lost earning capacity, either partial or total, is presented. 24 App. 608 (2) (101 S. E. 714).

Instruction of trial judge considered and held to nowhere submit to jury question of plaintiff's right to recover for lost capacity to labor and earn money, but to expressly confine jury to issue of wages lost up to time of trial. 24 App. 608 (3) (101 S. E. 714).

Evidence: Absolute proof of amount was not essential in action for damages to cotton from fire, it being sufficient that evidence and circumstances and inferences deducible therefrom furnished basis for reasonably accurate estimate. 144/178 (86 S. E. 550).

Excessive:

Arm: Sum of \$1,500 was not so excessive as to manifest prejudice or bias, where plaintiff, injured in automobile collision, sustained broken and dislocated left arm and wrist, suffered intense pain for three months, and use of arm was permanently impaired. 24 App. 785 (2) (102 S. E. 360).

Bias: Recovery of damages which can not legally be measured by any other standard than the enlightened conscience of impartial jurors can not be set aside on the ground that it is excessive, unless it is manifestly the result of prejudice, bias, or corrupt motive. 13 App. 100 (1) (78 S. E. 830).

Verdict for damages on account of personal injuries can not be held to be excessive, when it is not so large as to be manifestly result of prejudice or bias, or corrupt motive. 19 App. 336 (2) (91 S. E. 440).

Where there is nothing in the record to suggest bias or prejudice on part of jury, verdict can not be set aside as excessive where amount thereof could have been arrived at under proof submitted, taking into consideration that deceased was a wife and mother. 22 App. 313, 314 (2) (96 S. E. 17).

Eye: Verdict for \$2,000 for loss of an eye was not excessive. 18 App. 673 (1) (90 S. E. 364).

Hip joint: Recovery of \$5,550 for injuries to hip joint, which were growing worse, still causing suffering, and, according to evidence, rendered

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Excessive—continued.

plaintiff incapable of earning anything, not excessive. 14 App. 273 (2) (80 S. E. 688).

Homicide: Where trial judge approved verdict, reviewing court has no right to interfere upon ground that amount of \$3,000 awarded as damages for homicide of six-year-old boy was excessive. 18 App. 314 (2) (89 S. E. 373).

Verdict for \$4,000, returned four years after negligent homicide of plaintiff's son, who at time of death was fourteen years of age, and who contributed substantially to support of mother, was not excessive. 19 App. 691 (6) (91 S. E. 1068).

Leg: Verdict for \$2,000 against railroad company for loss of a leg and other minor personal injuries sustained. 18 App. 134, 135 (5) (88 S. E. 919).

Pain and suffering: Verdict here for \$1,250 in action for personal injuries causing pain and suffering not excessive. 15 App. 533 (2) (83 S. E. 796).

Verdict for damages based on personal injuries and pain and suffering can not be said to be legally excessive unless it is manifestly result of bias or prejudice, or improper influence. 15 App. 805 (4) (84 S. E. 144).

Permanent injury: Where evidence showed gravity and permanence of personal injury, contention that verdict of \$15,000 is excessive can not be sustained, where jury could have awarded that amount for suffering alone, and there was evidence that plaintiff's earning capacity had been seriously impaired. 15 App. 16 (1) (82 S. E. 600).

Verdict for \$9,500 in action by car inspector of railway company, 31 years of age, and whose average earnings were \$93 per month, was not excessive, physician testifying that in his opinion plaintiff, who had suffered injuries to his back and who had traumatic neurasthenia, would never be well again, and other physicians testifying that they could not say whether he would recover or not. 18 App. 396 (1) (89 S. E. 493).

Excessive—continued.

Personal injury: Recovery of \$6,000 for serious and perhaps permanent injury to traveling salesman of previous good health and about 41 years of age was not excessive here. 14 App. 674 (3) (82 S. E. 166).

Ribs: Verdict for \$650.00 for breaking two ribs and causing total disability for five or six weeks was not excessive. 140/254 (6) (78 S. E. 925).

False representation: In action for fraud and deceit in sale and purchase of horse and buggy measure of damages is difference between value at time of delivery and what would have been the then value if representation made by defendant had been true. 24 App. 438 (1) (101 S. E. 197):

Fright may be considered element of damage where there is physical injury attending cause of fright, or where it produces physical or mental impairment. 14 App. 722 (1) (82 S. E. 304).

To recover damages for physical injuries resulting from fright, it must be shown that injuries were actual result of fright, and defendant should have known that his negligence would, with reasonable certainty, cause such result. *Id.* 722 (2).

Insurance: Evidence in action for negligently firing plaintiff's property that plaintiff had received money from insurance company for destruction of property is inadmissible. 144/47 (1) (85 S. E. 1016).

Interest: Jury, in action to recover damages for value of property destroyed by negligence, could add to value of property destroyed sum equal to interest on such amount as damages. 142/381 (5) (82 S. E. 1066).

Finding of certain sum as interest *eo nomine*, in addition to principal sum sued for in action for breach of contract, was erroneous. 15 App. 460 (83 S. E. 795).

Court erred in charging that if jury found that contract was entered into through deceit, and that plaintiff was deceived in selling property, it would be their duty to find for plaintiff for amount sued for, with interest from time of delivery of property. 24 App. 438 (2) (101 S. E. 197).

In shipper's action against carrier

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to recover damages for partial destruction of shipment of eggs, being one in tort, verdict for interest on amount found was contrary to law. 24 App. 742 (4) (102 S. E. 168).

Live stock: Railroad company had not right to negligently reduce plaintiff's hog to pork, and to pay for the hog on the basis of pork, since value of living hog is not necessarily confined to market price of meat which hog would have produced. 19 App. 632 (91 S. E. 1006).

Married woman: Married woman whose capacity to labor has been permanently diminished by physical injury wrongfully inflicted may recover damages therefor as an element or species of pain and suffering. 145/656 (2) (89 S. E. 760).

Mental suffering: Where passenger has sustained no injury to his person or his purse, by receiving bodily hurt, or being subjected to insult, abuse, or humiliation, he can not recover for mental anguish arising from fact that carrier may have delayed to carry him to his destination within the published scheduled time. 141/51 (2) (80 S. E. 282).

Instruction that in some torts injury is to plaintiff's peace or feelings, in which case no measure of damages can be prescribed, except the enlightened consciences of impartial jurors, was erroneous. 142/720 (2) (83 S. E. 681).

Charge that "in some cases the entire injury is to the peace and happiness; in cases of this kind the only measure of damages prescribed is that to be determined by the jurors" was inapt here. 142/770, 771 (5) (83 S. E. 792).

It was error to charge that in some torts the entire injury is to the peace, happiness and feelings, and that no precise measure of damages can be prescribed, without stating that such instruction was applicable only to damage based on pain and suffering. 143/259 (2) (84 S. E. 584).

Special pecuniary damages are recoverable for injury to peace and happiness, in action for desecration of burial grounds. 143/291 (2) (84 S. E. 962).

Enforced idleness or diminished ef-

ficiency in offices of labor, being calculated to give rise to mental distress, can be classed with pain and suffering, and the jury may properly be instructed that the law fixes no other measure than the enlightened conscience of impartial jurors. 13 App. 100 (2) (78 S. E. 830).

Mental pain and suffering having been charged in petition, which was supported by evidence, charge that "physical injury which incapacitates a man or woman from labor is classified in law with actual mental pain and suffering, such pain and suffering as is charged in the petition," was not erroneous. *Id.* 100 (3).

Evidence that the fact that plaintiff was not able to work and carry on his duties as he was accustomed to do worried him was properly admitted. 13 App. 386 (1) (79 S. E. 243).

Charge that damages recoverable for mental pain and suffering is left to the enlightened consciences of intelligent jurors was not erroneous in the use of the word "intelligent" instead of "impartial." *Id.* 386 (2).

Where petition claimed actual damages for loss of ability to labor and physician's bills, but there was proof only of mental anguish and physical pain, not error to charge that there was no particular rule for determining damages recoverable for mental pain and suffering but that such damages were left to the enlightened consciences of intelligent jurors. *Id.*

Where neither plaintiff's petition nor the proof makes out case for recovery of actual damages, and her right of recovery is entirely for injuries to her peace, happiness, or feelings, charge that in some torts the entire injury is to the peace, happiness, or feelings of the plaintiff, and that in such a case no measure of damages can be prescribed except the enlightened conscience of impartial jurors, is not subject to criticism. 20 App. 249, 250 (3) (92 S. E. 1006).

Where petition alleged that plaintiff was permanently injured in that all of the fingers of his left hand had been severed, etc., instruction that as part of mental suffering jury might

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consider deformity, as plaintiff would be entitled to recover damages for consciousness he would carry through life of being a deformed person, was not subject to exception that pleadings did not authorize such instruction. 23 App. 605 (4) (99 S. E. 238).

Mortality tables:

Admissible: Mortality tables are not essential on question of expectancy of life. 15 App. 571, 572 (5) (84 S. E. 69).

In action for damages for injuries sustained in automobile collision, it was not error to admit in evidence the Carlisle Mortality Table, over objection that it was irrelevant, that there was no allegation or proof of permanent injury, or of reduced earning capacity, and no proof of value of services. 24 App. 785 (4) (102 S. E. 360).

Annuity tables: Giving of instruction on use of annuity table, without also instructing that it could not be used unless plaintiff's injuries were permanent, was prejudicial. 142/801 (1) (83 S. E. 943).

Under conflicting evidence as to whether injuries were permanent court should not instruct on use of annuity table without also instructing that it can be used only if injuries are permanent. *Id.*

Charge that jury were to use Carlisle Tables to determine probable age of plaintiff, not error when apparent from context that probable expectancy was meant. 13 App. 50 (1) (78 S. E. 781).

Where evidence was conflicting as to extent of plaintiff's injury, and whether it was permanent or temporary, charge as to use of annuity table should inform jury that it should not be used, unless injury was permanent. 145/276, 277 (6) (88 S. E. 983).

Conclusive: Mortality tables may be useful, but are not conclusive or absolutely essential. 15 App. 571, 572 (5) (84 S. E. 69).

Mortification: Allegation that plaintiff was disfigured by his injuries as alleged in petition and would suffer mortification was not demurrable as illegal, immaterial, and irrelevant. 16 App. 560, 566 (5) (85 S. E. 824).

Nominal damages: Under petition here employee whom employer refused to pay held entitled to at least nominal and "temperate" damages. 18 App. 483 (89 S. E. 597).

Where evidence in action for ejection was not sufficient to authorize recovery of special damages, but authorized verdict for nominal damages only, verdict for \$400 was excessive. 21 App. 485 (2) (94 S. E. 633).

Pain and suffering: Charge that if plaintiff is entitled to recover at all he would be entitled to recover for pain and suffering endured by reason of the injury, was, in light of entire charge, not ground for new trial. 140/254, 259 (78 S. E. 925).

Evidence on trial two and a half years after occurrence of injury, that plaintiff had lost part of his hand, and that such injury still caused the plaintiff pain at night, and that he could do a little work with that hand, and that he had been confined to the house for more than a week after being hurt, authorized charge on pain and suffering, mental and physical, which he might have suffered in the past, and might suffer in the future; this is true though plaintiff added to his testimony that his hand did not hurt him at the time of testifying. 140/727 (6) (79 S. E. 836).

Charge that if plaintiff would suffer future pain damages could be recovered therefor, and that amount for which defendant was liable rested in the enlightened consciences of the jury was not fatally defective. 142/657, 658 (5) (83 S. E. 518).

Charge that plaintiff sues for pain and suffering, which she claims to have sustained, and that she will continue to endure this pain, and that her general health has been impaired; that there is no mathematical measure given by law for this; and that the jury ascertains from the evidence how much pain and suffering has been undergone by plaintiff, and how much she will undergo, if the evidence discloses it, held adapted to the evidence. 13 App. 61 (1) (78 S. E. 779).

Loss of ability to labor constitutes pain and suffering. 13 App. 386 (1) (79 S. E. 243).

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Sick passenger, wrongfully carried beyond destination, may recover damages for physical suffering, which, as necessary result of his condition, is traceable to negligent act. 14 App. 311, 312 (3) (80 S. E. 725).

Where woman exercising ordinary care in walking across railroad track at street crossing in city, attended by her two small children, discovers that she is about to be run down by engine approaching in grossly negligent manner, and leaps from track and falls to ground, and one child is mangled by engine in her presence, and woman sustains shock and endures pain and suffering, she has right of action for the wrong to herself. 146/243 (1) (91 S. E. 28).

But if woman, having crossed track, did not leap and fall or sustain personal injury, fact that she witnessed mangling of child and suffered severe nervous shock therefrom, would not entitle her to recover. *Id.* 243 (2).

Damages for pain and suffering may be recovered under the Federal employer's liability act. 21 App. 704, 706 (4) (94 S. E. 909).

In suit for pain and suffering, evidence that scars on knee of female child, remaining considerable length of time after two operations had been performed upon the knee, which caused knee of one leg to be one-fourth of an inch larger in circumference than other, and that as result of injury child's leg was "crooked," and that in walking she would never have "true use" of her foot, was sufficient to authorize charge on subject of deformity. 24 App. 411, 412 (5) (101 S. E. 2).

In action for injuries sustained in automobile collision, charge as to fu-

§ 4503. (§ 3906.) Aggravation.

Amendment: Petition here for damages for injury to property was amendable by adding paragraph charging that acts complained of were done willfully, to cause unnecessary inconvenience, and claiming exemplary damages. 142/401 (1) (83 S. E. 107).

Assault and battery: Where petition shows clearly that plaintiff sued for unprovoked assault and battery, pray-

ing pain and suffering was not erroneous because annuity tables had not been introduced in evidence nor as against objection that there was no proof of permanency of injury, nor value of services, and authorizing its allowance at the present cost value figured at 7% per annum. 24 App. 785 (5) (102 S. E. 360).

Permanent disability: Evidence here authorized charge on permanent disfigurement of plaintiff's thumb. 15 App. 369, 370 (3) (83 S. E. 445).

Charge here as to damages for permanent injury was not erroneous because of statement that no fixed rule exists for estimating such sort of damages. 145/521, 522 (2) (89 S. E. 620).

Pleadings: Paragraph of petition in personal injury action averring that plaintiff's expenses for medical attention were "\$—," is subject to special demurrer. 144/275 (2) (87 S. E. 10).

Where petition alleged that plaintiff's car was set on fire by lighted lamp being thrown from its place by jar, and undisputed evidence showed that lamp was not lighted, but fell into fire and broke, there was fatal variance. 16 App. 683 (3) (85 S. E. 954).

Railroad car: Measure of damages to car from fire was difference in its value before fire and value after being repaired after fire. 16 App. 683 (2) (85 S. E. 954).

Value of property: Owner's right to recover value of property converted is not affected by fact that he purchased it for less than value, or received it as gift. 16 App. 834, 835 (5) (86 S. E. 651).

ing compensation for injuries inflicted, and, by reason of certain alleged aggravating circumstances, asked for punitive or exemplary damages, exception that verdict is contrary to law because plaintiff seeks to recover for only mental pain and suffering, and not for any physical injury is without merit. 23 App. 33 (2) (97 S. E. 277).

Charge of provisions of this section was

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not error here in action for damages from nuisance. 142/401 (3) (83 S. E. 107).

Ejecting passenger: Evidence here in action for being ejected from train sustained verdict for plaintiff for \$350. 14 App. 619, 621 (8) (82 S. E. 299).

Allegations in action to recover for being ejected from train that while walking from place of ejection to station last passed by train, through section of country in which he was a stranger, plaintiff was accosted by a strange white man and notified that no colored person could safely traverse that section of the country, and plaintiff was forced to hire said white man to escort him through that section, giving him therefor a five-dollar watch chain, were not wholly irrelevant, but, had such allegation been set forth as element of recovery, would have been demurrable. 21 App. 367 (4) (94 S. E. 619).

Fire: Railroad company which has negligently set out large number of fires on different occasions may be held liable for punitive damages in action for damages from one of such fires. 16 App. 504, 505 (3) (85 S. E. 804).

Negligence: Where allegations of petition in action for personal injury, based on negligence alone, present no question of willfulness, wantonness,

malice, oppression, or conscious indifference to consequences, it is not erroneous to strike allegation claiming punitive damages. 146/151 (2) (90 S. E. 963).

In action for recovery of damages for commission of mere negligent tort which involves no actual physical invasion of one's rights of person or property, but which consists in omission to perform private duty springing out of relation of carrier and passenger, breach of which results in damage to person to whom that duty is owing, law of trespass is not involved, and it is therefore error to give in charge the last clause in this section. 20 App. 249 (2) (92 S. E. 1006).

Where only reasonable legal construction of petition is that damages complained of resulted from grossly negligent failure of telegraph company's servants in performance of ordinary public duties owing plaintiff, recovery for punitive or exemplary damages growing out of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise presumption of conscious indifference to consequences was not authorized. 23 App. 479 (3) (98 S. E. 407).

§ 4504. (§ 3907.) Vindictive damages.

Cited. 18 App. 396 (1) (89 S. E. 493); 24 App. 527 (101 S. E. 699).

Charge: Where harmless in view of whole charge and evidence, error in charging in accordance with last part of this section, which was inapplicable, was not ground for reversal. 144/46 (2) (85 S. E. 1042).

Error in instructing that damages recoverable by plaintiff, if she was entitled to recover, were to be fixed by enlightened conscience of jury, was not corrected by correct statement that plaintiff was only entitled to recover money value of her husband's life, in absence of express retraction of incorrect instruction. 18 App. 113, 114 (6) (88 S. E. 1003).

Where alleged assault was made upon individual partner, and there was no allegation authorizing partnership

to recover for wounded feelings, it was error to give in charge that part of this section declaring that in some torts entire injury is to the peace, happiness, or feelings of the plaintiff, etc. 18 App. 196, 197 (4) (89 S. E. 188).

Fright may be considered element of damage where there is physical injury attending cause of fright, or where it produces physical or mental impairment. 14 App. 722 (1) (82 S. E. 304).

To recover damages for physical injuries resulting from fright, it must be shown that injuries were actual result of fright, and defendant should have known that his negligence would, with reasonable certainty, cause such result. *Id.* 722 (2).

Mental suffering: Carrier is liable for injuries resulting from requiring pas-

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senger to disembark at unsafe place, but not for mental and physical suffering occasioned solely by mistake in taking wrong train or in making an effort to return to place of safety. 13 App. 298 (2) (79 S. E. 91).

Where plaintiff did not ask damages for physical injury, but made her whole claim for mental suffering, recovery can not be had, notwithstanding wantonness of injury. 17 App. 79 (1) (86 S. E. 256).

Nonsuit was error in action for damages on account of sickness caused by drinking beverage from bottle containing body of dead and putrid mouse, as jury might infer that plaintiff's suffering was due to mental anguish caused by discovery of loathsome contents of bottle. 18 App. 226 (2) (89 S. E. 495).

Where evidence did not show that injury was more than mental anguish and physical pain unaccompanied by physical injury to person, and plaintiff's inconvenience and physical illness were not natural or reasonable consequence of defendant's alleged tort, and defendant could not have anticipated that such consequence would naturally or reasonably flow therefrom, it was error to overrule defendant's motion for new trial. 23 App. 161 (97 S. E. 866).

There can be no recovery of damages because of mental pain and anguish alone which resulted from mere negligence, when there was no physical tort resulting in injury to person or purse. 23 App. 473 (98 S. E. 409).

Pain and suffering could be inferred from nature and character of wound inflicted upon plaintiff, a child of tender years, which rendered him unconscious, from which he bled profusely, and which necessitated his removal to a hospital, and recovery was author-

ized therefor. 19 App. 792 (92 S. E. 286).

Property: Where evidence authorized inference that injury to plaintiff's property was inflicted in reckless disregard of his rights, finding of punitive damages was authorized. 16 App. 635 (2) (85 S. E. 932).

Plaintiff can not recover general damages on ground that he was humiliated, mortified, or shocked, where injury complained of is not a personal tort, but an injury to property. 21 App. 265 (2) (94 S. E. 274).

Worldly circumstances: Where plaintiff sued for damages on account of alleged unlawful battery, it was error for court to charge jury that in estimating the damages the worldly circumstances of the parties should be considered and weighed. 21 App. 732 (1) (94 S. E. 1043).

Where the entire injury sued for was not to the peace, happiness, or feelings of the plaintiff, it was reversible error for the court to charge the jury that they should weigh the worldly circumstances of the parties. 23 App. 96 (3) (97 S. E. 553).

Where personal injury alleged was not entirely to the peace, happiness and feelings of plaintiff, it was reversible error for court to give in charge provisions of this section that "the worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed." 23 App. 604 (99 S. E. 222).

Wounded feelings: Where alleged assault was made upon individual partner, and there was no allegation authorizing partnership to recover for wounded feelings, it was error to charge the jury could give additional damages for wounded feelings of plaintiffs. 18 App. 196, 197 (4) (89 S. E. 188).

§ 4505. (§ 3908.) Necessary expenses.

Pleading: Allegation in petition, in action for damages from sickness due to a nuisance, as to expense of moving, was not demurrable on ground that it was not the proximate result

of such nuisance, or that there should be an itemized statement of the elements of expense involved in the moving. 141/191 (2-c) (80 S. E. 645).

Slander: Necessary expenses consequent

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upon injury done are legitimate items of damage in personal injury cases only, and the rule is entirely inapplica-

ble in a slander suit. 20 App. 241 (2) (92 S. E. 950).

§ 4507. (§ 3910.) **General damages, special damages.**

Cited. 141/191, 193, 194 (80 S. E. 645).

Charge defining general damages in language of this section and stating that in addition to general damages plaintiff claims that he is entitled to punitive damages, was not ground for new trial, where verdict could have been only for punitive damages. 14 App. 619, 620 (5) (82 S. E. 299).

Slander and libel: Where, in suit for slander, only general damages were asked, and no evidence was submitted upon question of special damages, it was error for court to charge that special damages are such as actually flowed from the act, and must be proved in order to be recovered. 20 App. 241 (1) (92 S. E. 950).

§ 4508. (§ 3911.) **Direct and consequential damages.**

Earnings: Consequential damages necessarily resulting from tortuous act may be recovered for loss of time. 14 App. 674 (2) (82 S. E. 166).

Usual average earnings of injured person, where proof thereof is reasonably certain, may be shown as basis of recovery. *Id.*

Fire: Municipal corporation which operated electric-light plant and carelessly installed switch, in consequence of which building was destroyed by fire, was liable for the loss. 142/840 (2-4) (83 S. E. 939).

Telegram: Damages alleged to have been sustained because of non-delivery of message to charter vessel for shipment of lumber to Europe were too remote, uncertain, and conjectural to authorize recovery, where petition nowhere alleged that plaintiff sold the timber at a price certain, or that he had a purchaser, but merely alleged that plaintiff could have sold in Europe at the market price. 21 App. 737 (94 S. E. 1033).

§ 4509. (§ 3912.) **Damages too remote, when.**

See notes to § 4510.

Cited. 18 App. 769 (90 S. E. 725).

§ 4510. (§ 3913.) **Rule to ascertain.**

Balking horse: Where it appeared from recitals of fact in petition against defendant railroad that proximate cause of injury was balking of plaintiff's horse, and petition nowhere alleged that defendant, by any specific act of negligence, caused balking of horse and resulting injury, court did not err in sustaining general demurrer and in dismissing suit. 24 App. 303 (2) (100 S. E. 731).

Crops: Items of damages due to crops' becoming sick and moving away were too remote and speculative to authorize recovery of value of crops alleged to have been thus lost, in action for damage from water, backed by dam, becoming stagnant. 144/135 (86 S. E. 324).

Fire: Municipal corporation which operated electric-light plant and carelessly installed switch, in consequence of which building was destroyed by fire, was liable for the loss. 142/840 (2-4) (83 S. E. 939).

Cost of renting another building and damages to business from being without building for two months were too remote to be recoverable in action for damages from destruction of building. *Id.* 840 (4).

Independent contractor: Petition in action against owner of building, prospective tenant thereof, and contractor employed to make certain alterations therein alleging that owner retained possession and control of the building, that the contractor and prospective

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tenant each severally requested petitioner to go to the building and there to make an estimate of cost of certain work, that petitioner went to the building for purpose of making estimate and fell into hole which defendants negligently failed to guard, etc., failed to show breach of any duty which contractor owed petitioner and was demurrable. 23 App. 465 (98 S. E. 359).

Intervening cause: Petition alleging that defendant allowed certain material to escape from gas plant, and to flow in open ditch, some of which on account of object being tossed therein splashed in the face of plaintiff while he was walking along the sidewalk, producing injury, was not demurrable on ground that injury was attributable to act of independent agency of which defendant had no control. 145/440 (2) (89 S. E. 423).

Jury: Where negligence alleged was proximate cause of damages from collision between plaintiff's motorcycle and defendant's automobile was question for jury. 17 App. 733 (2) (88 S. E. 409).

Nuisance: Where nuisance is not of permanent nature, but one that may be abated at any time, and upon its abatement no further injury would result, person whose land is injured is not entitled to recover damages for both past and prospective injuries to the land, but can recover for only such injuries as were actually sustained, within period prescribed by statute of limitations, before suit was brought. 22 App. 490 (2) (96 S. E. 328).

Profits: While speculative profits can not be recovered as damages, profits which would have been received but for acts of defendant may be so recovered where they are definite and certain. 14 App. 738 (3) (82 S. E. 310).

Charge in suit for negligent homicide of one who was conducting a dairy, to determine gross receipts of dairy, "and then take all expenses that contributed to the fund, rent of his land, and any expenses incurred in and about the dairy, and difference between total expenses and

total receipts would be net earnings, and that would be average yearly loss; and you multiply his average yearly loss by the expectation of years, and that would give you the gross amount of plaintiff's recovery," was error. 145/696, 697 (4) (89 S. E. 753).

Proximate cause: While master may be liable for injury to servant resulting from master's negligence, although master, in exercise of ordinary care, could not have foreseen that negligence would result in injury of particular kind produced, or in particular servant being injured, he can not be held liable unless injury was natural and probable result of his negligence; he is not liable unless, by exercise of ordinary care and diligence, he could have reasonably apprehended that his negligence would or might result in injury to some one of his servants. 23 App. 476 (98 S. E. 408).

Where undisputed evidence clearly showed that, even if defendant company was negligent as alleged, direct and proximate cause of homicide sued for was intervening act of separate and intervening agency, verdict for defendant was not only authorized but demanded, and court did not err in overruling motion for new trial. 23 App. 753 (99 S. E. 638).

Railroad company: Injury to feelings of female insulted by driver of carriage who was engaged by conductor of train and telegraph operator at station to take her to her home was not a proximate result of railroad company's negligence in failing to stop train at her station. 21 App. 50 (1) (93 S. E. 547).

Speculative damages: Damages consequent upon breach of railroad company's covenant to construct side track and erect warehouse to be used as a depot, in consideration of grant of right of way, are not necessarily speculative, though resting upon opinion of witnesses. 13 App. 357, 358 (7) (79 S. E. 187).

Telegram: Damages alleged to have been sustained because of non-delivery of message to charter vessel for shipment of lumber to Europe where too remote, uncertain, and conjectural to

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authorize recovery, where petition nowhere alleged that plaintiff sold the timber at a price certain, or that he had a purchaser, but merely alleged that plaintiff could have sold in Europe at the market price. 21 App. 737 (94 S. E. 1033).

While addressee of telegram may sue telegraph company in tort and recover for such damage as proximate-

ly results from its breach of duty to serve public with due care, he can not recover for damage not caused by negligence of company, but which resulted from his voluntary act in complying with terms of a proposal or contract which he was under no legal compunction to perform. 20 App. 663 (1) (93 S. E. 256).

§ 4511. (§ 3914.) **Exception to rule.**

Cited. 143/827, 834 (85 S. E. 1050).

Fire: Municipal corporation which operated electric-light plant and carelessly installed switch, in consequence of which building was destroyed by fire, was liable for the

loss. 142/840 (2-4) (83 S. E. 939).

Pleading: Plaintiff should allege facts showing that damages claimed fall within this section. 140/51 (3) (78 S. E. 413).

§ 4512. (§ 3915.) **Against joint trespassers.**

Stated. 13 App. 29 (78 S. E. 686).

Cited. 147/428, 431 (94 S. E. 558).

Collision: Where plaintiff charged that she was damaged by two defendants, and alleged that damage was occasioned by collision between street car belonging to one defendant, upon which she was passenger, and automobile belonging to other defendant, but separately charged acts of negligence against each defendant as causing collision, and it appeared from petition that such acts of negligence jointly and concurrently caused collision and thereby produced damage, plaintiff sufficiently charged defendants as being joint tort-feasors. 24 App. (4) (101 S. E. 401).

Conspiracy is not gravamen of charge, in action on the case for conspiracy, but may be both pleaded and proved as aggravating the wrong of which plaintiff complains, enabling him to recover

in one action against all as joint tort-feasors. 149/67 (1) (99 S. E. 123); 23 App. 736 (1) (99 S. E. 393).

Rule that where conspiracy is shown, act of one becomes act of all, in so far as furtherance of conspiracy is concerned, applies with no less force to action for resulting tort than to prosecution for resulting crime, and applies alike in all cases, whether alleged tort amounts to crime or not. 19 App. 334 (1-a) (91 S. E. 434).

Where petition alleges that two or more persons conspired to defraud and did defraud petitioner, and his action is brought against only one of them to recover for tortious acts of all, proof of conspiracy is necessary only in order to charge conspirator sued with responsibility for acts of those not sued. 19 App. 334 (2) (91 S. E. 434).

§ 4513. (§ 3916.) **Contribution.**

Cited. 147/428, 431 (94 S. E. 558).

Burden of proof was on plaintiff to show that proximate cause of injury to plaintiff's employee, for which it has already been mulcted in damages, was result of positive wrongful acts and negligence upon part of defendant in instant case, and that plaintiff had not participated in such wrongful acts and was not mere joint tort-feasor in sense that it had been

guilty with defendant of same or like negligence which resulted in causing fatal injuries. 20 App. 548 (4) (93 S. E. 170).

Indemnity: Where one of two or more joint tort-feasors has been sued for and compelled to satisfy damages arising from jointly tortious transaction, he can not, as general rule, maintain action either for contribution or indemnity over against those connected

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with him in tort. 23 App. 346 (1) (98 S. E. 256).

Same or like negligence: Petition showing that plaintiff had been required, under judgment in prior suit, to pay a certain sum as damages for a homicide, and that in such suit it had vouched in the present defendant, that the homicide was caused by wrongful acts and negligence on the part of defendant, in which plaintiff had not participated, and that it was not guilty of the same or like negligence as that of defendant, stated a right of action in plaintiff, and it was error to sustain general demurrer thereto. 140/309 (1) (78 S. E. 931).

Where liability of tort-feasor in original suit arises merely from negative acts of omission, such as failure in his duty to inspect, and proximate

cause of injury, so far as joint tort-feasors are concerned, lay in active, positive acts of negligence on part of other tort-feasor, in which original defendant did not participate, general rule does not apply. 23 App. 346 (1) (98 S. E. 256).

Act of railroad company in operating train along private track and under dangerously low shed maintained by oil mill company, without warning employee who was killed, amounted to actual participation in proximate cause of homicide rather than mere legal, passive acquiescence in negligence of oil mill company in maintaining shed in dangerous condition, and railroad company could not recover from oil mill company amount of judgment paid for homicide of employee. 23 App. 346 (2) (98 S. E. 256).

§ 4514. (§ 3917.) Highest amount proved.

Bail trover: Where landlord seeks by bail trover against his cropper to recover property, title to which plaintiff holds merely as security for supplies furnished, or other debt, and he elects to take money verdict, he can not recover more than amount of debt for which property stands as security. 18 App. 57 (88 S. E. 799).

Direction of verdict: Where suit in trover is brought by vendor against third person, and not against original vendee, and there is no proof of value of property sued for, direction of money verdict is error. 22 App. 608 (5) (96 S. E. 705).

Election: Plaintiff having elected to take money verdict, measure of damages could not exceed principal and interest of his debt, less any sum which had been received by him in part payment, notwithstanding value of property exceeded amount due at time of trial. 13 App. 419 (3) (79 S. E. 225).

Where there was no evidence definitely fixing value of property, there was nothing on which to base money verdict, though there was testimony that defendant admitted that he converted property. 16 App. 255 (4) (85 S. E. 268).

Where plaintiff elected to take money verdict, proof of value of property sued for was necessary, but where there had been an agreement as to price agreed price was prima facie evidence of such value. 17 App. 669, 670 (3) (87 S. E. 1097).

Where plaintiff in action of trover elects to take money verdict he may recover highest proved value of converted property between time of conversion and trial, not in excess of value of property alleged in petition. 22 App. 404 (1) (95 S. E. 1001).

Where, in suit in trover brought under short form, plaintiff elects to take a money verdict for the highest proved value of the property between the date of conversion and the date of trial, recovery can not exceed value alleged in petition, without an amendment covering the excess. 22 App. 564 (96 S. E. 505).

Interest: Where verdict in trover is for stated sum as principal and stated sum as interest, judgment will be set aside unless plaintiff write off the amount allowed as interest. 145/558 (89 S. E. 487).

Verdict for plaintiff in trover should have been for lump sum, and not for stated sum "with interest at 7 per

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cent." 24 App. 661 (3) (101 S. E. 815).

Security: Where plaintiff in trover holds title as security and elects money verdict, he may recover highest proved value between conversion and trial, or value at date of conversion with interest, but in neither case can he recover more than amount of debt. 15 App. 678 (1) (84 S. E. 165).

Where plaintiff in trover suit for recovery of property title to which plaintiff holds as security for debt elects to take a money verdict, measure of damages is either the highest proved value of the property between the date of conversion and the trial, or value of property at date of conversion, with interest or hire thereon, subject, however, to condition that under neither choice can a recovery be had for more than the amount of the debt for which the property stands as security. 21 App. 168 (2) (94 S. E. 46).

Time of conversion referred to in this section is time when defendant himself converted to his own use property sued for. 15 App. 674 (84 S. E. 142).

Ordinarily the measure of damages where property has been converted is its market value at the time of conversion. 20 App. 39 (3) (92 S. E. 398).

Value: "Highest proved value" means highest value which jury, under proofs, may fix, and not highest estimate given by any witness as to value. 15 App. 674 (84 S. E. 142).

Contract of conditional sale here was prima facie evidence of actual value of property converted. 15 App. 678 (1) (84 S. E. 165).

Highest proved value which is recoverable in trover is amount which jury, from consideration of all evidence, find to be highest value between time of conversion and trial. 16 App. 255 (1) (85 S. E. 268).

Where, in trover suit, there is no specific ad damnum clause in the conclusion of the declaration, and prayer is that process issue, require the defendant to be and appear at the next term of court to answer the complaint, amount of damages asked for will be construed to be alleged value of property sued for. 20 App. 143 (2) (92 S. E. 775).

§ 4515. (§ 3918.) Measure of damages for timber cut.

General Note.

Burden of proof: In action of quare clausum fregit for damages for cutting timber, plaintiff, relying for title on a deed, expressly stating that it did not convey grantor's timber rights, had burden of proof. 146/750 (1) (92 S. E. 281).

Charge here on measure of damages for cutting timber on plaintiff's lands, directing jury to consider the diminution in value of the freehold in consequence of such cutting was not error. 145/505 (1) (89 S. E. 518).

Where controlling point on trial was whether title to land from which de-

fendants cut and removed timber was in plaintiff or defendants, and there was general verdict in favor of defendants, error in charge as to measure of damages did not require new trial. 147/203, 204 (4) (93 S. E. 206).

Timber: In action of quare clausum fregit, for damages for cutting timber, and for construction of tramroad over land, and for injury to crops, plaintiff having no title to timber under deed, instruction eliminating from consideration of jury question of damage to timber was proper. 146/750 (1) (92 S. E. 281).

Of equity; general principles.

TENTH TITLE.

Of Equity.

CHAPTER 1.

General Principles.

§ 4518. (§ 3921.) Equity jurisdiction.

City court:

Defenses: While a city court is without jurisdiction to afford plaintiff affirmative equitable relief, it may entertain an equitable defense which will prevent plaintiff from recovering. 13 App. 759 (79 S. E. 927); 147/96 (1) (92 S. E. 879).

Floyd county: City court of Floyd county had no jurisdiction where it appeared that plaintiff could only assert his cause of action, if he had any, in equity. 17 App. 470 (87 S. E. 693).

Lien: In suit upon promissory notes prayer for establishment of special lien upon real estate, conveyed as security for payment of debt evidenced by the notes, does not render proceeding a case respecting title to land, and in such suit the city court of Thomasville has jurisdiction to declare special lien on realty. 18 App. 45 (1) (88 S. E. 825).

Set-off: City court has no jurisdiction to grant affirmative equitable relief, and therefore can not allow claim ex delicto to be set off against claim ex contractu. 14 App. 84 (2) (80 S. E. 341).

City court—continued.

City court has jurisdiction to entertain plea of recoupment and to give judgment for the excess. 20 App. 36 (1) (92 S. E. 397).

Condition precedent: Jurisdiction in a court of equity must first exist before it can exercise equitable powers; jurisdiction must precede rather than follow receivership, injunction, etc. 147/588 (1) (95 S. E. 81).

Judgment: Prayer in action on note that judgment be declared to be a general judgment against property of defendant as well as against property included in security deed not stricken because no such special judgment is authorized in court without equity jurisdiction. 18 App. 242 (1) (89 S. E. 459).

Nuisance: Action by private person against electric company for damages on account of unauthorized maintenance over its land of electric wires charged with high voltage, alleged to be nuisance and injurious to property, in which only prayer is for damages and for abatement of nuisance by removal of wires from property under order and decree of court, is not an equitable action. 147/334 (1) (94 S. E. 249).

§ 4519. (§ 3922.) Grounds of relief.

Crime: Where man has debauched minor girl and induced her to abandon parental abode and live with him in state of adultery and fornication, and persists in continuance of such conduct, equity will afford remedy by injunction, and to that end, in suit by

father, will enjoin man from associating and communicating with the girl, either by writing, telegraphing, telephoning, personally or through the aid or agency of any other person. 149/227 (1) (99 S. E. 861).

Of equity; general principles.

§ 4521. (§ 3924.) **Complainant must do equity.**

Administrator: Where heirs who brought suit against administrator and attorney who purchased at the sale of intestate's property to set aside such sale did not receive any of the purchase money, they were not required, under the maxim that he who seeks equity must do equity, to refund to the attorney the amount of money paid by him for the land. 149/697, 698 (2) (101 S. E. 794).

Consideration: Petition to cancel deed as cloud on title on ground that it was void as representing sale by wife of her separate estate to her husband for a valuable consideration, without order of court, demurrable, in absence of offer to return consideration recited and acknowledged in the deed. 140/678, 679 (5) (79 S. E. 557).

Lien: Where funds of defendant bank which held as security bond for title to land were applied to discharge of valid and subsisting lien upon property in controversy, plaintiff is in equity and good conscience bound to reimburse defendant before she can recover the property. 147/265 (5) (93 S. E. 418).

New trial: Points that plaintiff was not entitled to verdict because he came into equity without clean hands, and after long delay, were not well taken under general grounds of motion for new trial, especially where it did not appear that such points were presented to or passed upon by trial judge. 148/812 (1) (98 S. E. 549).

Set-off: While in appropriate case indebtedness on open account may be set off against judgment when holder of such judgment is insolvent, it is not abuse of discretion to refuse injunction to restrain levy of *fi. fa.*,

because amount of alleged equitable set-off was less than amount of judgment, and there was no tender of the difference. 146/180, 181 (2) (91 S. E. 21).

Tender: Where plaintiff suing to enjoin illegal *fi. fa.* proceeding against land of party with whom plaintiff had exchanged land did not tender principal, interest, and costs due, injunction was properly refused. 148/488 (97 S. E. 407).

Usury: Temporary injunction ancillary to prayer for cancellation of deed alleged to be infected with usury can not be granted where plaintiff does not offer to do equity by paying or tendering amount due. 146/142 (2) (90 S. E. 864).

Though deed may be void for usury, or transfer of bond for title be void because debt to secure payment of which transfer was made was usurious, these papers will not be cancelled or set aside in an equitable suit, without payment or tender of principal or lawful interest; whoever would have equity must do equity. 146/732 (1) (92 S. E. 52).

Wife: Petition in equitable action brought by widow, alleging death of husband intestate, without lineal heirs, seized and possessed of certain lands, that petitioner is sole heir, has paid all debts with possible exception of one to defendants, defendants' possession and conveyance of such land, her willingness to pay balance of any indebtedness and tender thereof, and seeking accounting as to amount paid on indebtedness and rents of land, set forth cause of action against all defendants. 148/675, 676 (2) (97 S. E. 856).

§ 4522. (§ 3925.) **Complete justice.**

Cited. 149/787, 796 (102 S. E. 528).
Stated. 148/708 (98 S. E. 265).

Injunction: Where court acquired jurisdiction for cancellation of deed, it could retain jurisdiction for other equitable relief, such as grant of injunction. 148/282 (3) (96 S. E. 562).

Stock: Where suit is instituted to pre-

vent holder of shares of stock in corporation from voting same at corporate election, to enjoin sale or incumbrance thereof, and to cancel certificate issued by corporation to holder in lieu of original certificates theretofore issued to plaintiff, answer setting up that stock was held as col-

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lateral security for described indebtedness owing by plaintiff to defendant, and praying for judgment for

amount of debt, and special lien against collateral, is germane. 147/617 (1) (95 S. E. 209).

§ 4525. (§ 3928.) **Volunteers.**

Recording: In contest here between earlier deed to plaintiff, made in execution of implied trust, and later voluntary deed to defendant, both exe-

cuted by same grantor, priority of recordation gave no priority of title to defendant's voluntary deed. 148/486 (1) (97 S. E. 69).

§ 4526. (§ 3929.) **Party misled.**

Note: Under this section and section 4537 if one apparently joint maker of note permitted other maker to take it to secure surety without notice

that he was other than principal, he could not set up against surety that he also was a mere surety. 144/74, 75 (1-a) (86 S. E. 249).

§ 4528. (§ 3931.) **Possession notice of title.**

Cited. 143/143, 149 (84 S. E. 549).

Stated. 141/642 (2) (81 S. E. 881).

Adverse possession of land is notice of whatever facts in reference to the title would be developed by inquiry of the person in possession, reasonably prosecuted. 141/65, 66 (5) (80 S. E. 462).

Charge: Court properly instructed that possession of land is notice to the world of every right the possessor has therein, legal or equitable. 149/218, 219 (1) (99 S. E. 863).

Grantor: Rule stated by this section and section 4530 applies to possession by grantor after making of deed by him. 142/49 (1) (82 S. E. 440).

Heirs: Where one buys land of which another than grantor is in possession, purchaser is bound to take notice of claim of person holding possession; but such possession affords no basis for heirs at law of grantor to set up claim adverse to grantee when person in possession abandons same. 147/329, 330 (2) (93 S. E. 877).

Husband and wife in possession of land, the possession is presumably that of the husband. 141/65, 66 (5-a) (80 S. E. 462).

In view of evidence authorizing finding that husband of plaintiff instructed vendor to make deed, provis-

ion of this section that possession by husband with the wife is presumptively his possession, but it may be rebutted, was applicable; failure to so charge, in absence of request, was not reversible error. 149/218, 219 (2) (99 S. E. 863).

Husband and wife in actual possession, record title being in husband, wife's possession was not notice of her right and title to the land. 149/220, 222 (100 S. E. 72).

Nature of possession: Possession of land is notice of whatever right or title the occupant has; but in addition to other essential elements of possession, it must be present, visible, and open. 149/103 (2) (99 S. E. 437).

Security deed: Where owner executes deed as security and remains in possession and grantee conveys to another without actual notice of nature of deed, but who has made no inquiry of occupant, latter may pay or tender amount of debt to first grantee, and sue both grantees for cancellation of both deeds. 141/642 (3) (81 S. E. 881).

Time: Possession which will charge purchaser with notice is possession when purchaser obtains title, and not possession prior thereto. 142/806 (3) (83 S. E. 941).

§ 4529. (§ 3932.) **Notice.**

Bond for title: Where A loaned B money, and to secure payment B executed warranty deed to A, and took

from A bond for title conditioned to reconvey to grantor, or his assigns, upon payment of sum specified, and

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thereafter B borrowed additional sum, giving promissory note, which expressly authorized A to retain any deposit, etc., in possession of A during time note remained unpaid, and to apply same to any debt or liability to A, transferee of bond for title, without notice of last or additional loan, could enforce bond according to terms thereof, and grantee could not resist demand on ground that he was entitled before performance to repayment of second loan. 149/663 (101 S. E. 796).

Customs: Where ginner delivers to warehouseman as agent to collect certain charges a number of bales of cotton, and attaches to each bale tag showing charges due him, and warehouseman, without collecting same, delivers cotton to purchasers, together with warehouse receipt containing statement of charges, and it was universal custom in such community for owner of cotton so stored, or holder of receipts, to pay ginning charges when cotton was sold or removed from warehouse, which custom was well known to purchasers, right of recovery of such charges on part of ginner was disclosed. 24 App. 731 (3) (102 S. E. 183).

Insurance: Where two sons of insured, pursuant to agreement with him, paid dues and assessments, each son was charged with notice of equi-

ty of the other. 143/75 (2) (84 S. E. 428).

Where beneficial society, with notice that plaintiff had an equitable interest in the benefits of the certificate, paid insurance money to its codefendant as sole beneficiary, such payment constituted no defense for either defendant. *Id.*

Where defendant society pleaded to the merits it was chargeable with notice of plaintiff's equity as set out in the petition from date of the service. *Id.*

Trust: Purchaser from husband with notice of trust in favor of wife took subject to trust. 143/607 (2-a) (85 S. E. 852).

Where owner of land conveyed to trustees, reserving life estate, and subsequently made contract with third party that if latter would move upon the land and support her during her life she would give him the property, which offer was accepted, but the third party taking no written conveyance, and, after number of years, received notice of prior conveyance, but continued to reside upon the land and supported such owner until her death, such third party could not defend suit by trustees to recover land on ground that he was bona fide purchaser for value and had title to property. 148/255 (2) (96 S. E. 431).

§ 4530. (§ 3933.) Notice extends to facts discoverable.

Cited. 142/821, 827 (83 S. E. 961); 143/143, 149 (84 S. E. 549); 145/716 (2-b) (89 S. E. 817).

Actual notice: Burden is on holder of senior unrecorded mortgage to show clearly actual notice of mortgage to former mortgagees. 232 Fed. 100 (1); s. c. 146 C. C. A. 292.

Grantor: Rule stated by this section and section 4530 applies to possession by grantor after making of deed by him. 142/49 (1) (82 S. E. 440).

§ 4531. (§ 3934.) Bona fide purchaser.

Lien: Bona fide purchaser, without notice, of crop grown on rented premises, will be protected against lien, general or special, of the landlord for rent. 24 App. 404 (1) (100 S. E. 794).

Note: Where owner of shares of stock sold same and received certain money and a promissory note, and the purchaser sold same to plaintiff for value and without notice or knowledge of

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the equities, if any, of such owner, the equitable title thereto passed into plaintiff. 148/97, 98 (2) (95 S. E. 975).

Notice: Where there was evidence that plaintiff's husband compelled her to make a deed, there was no error in permitting her to testify that she had notified the principal defendant who claimed under such deed. 142/322, 323 (5-a) (82 S. E. 1069).

Payment: Under the rule in equity, to constitute one a bona fide purchaser in the full sense, he must pay the purchase money or at least place himself in position where he is in all

events bound to pay the purchase money, he must get title, and he must pay the purchase money and get title before notice of the rights of third persons. 149/220 (1) (100 S. E. 72).

Rent: In distress for rent due, with claim by alleged bona fide purchaser of crop from tenant, charge that if defendant in fi. fa. was indebted to plaintiff in fi. fa. for rent for year in which crop was raised, and sold crop to claimant without notice that rent was due, property would be subject to fi. fa., was erroneous. 24 App. 404 (2) (100 S. E. 794).

§ 4532. (§ 3935.) May do what court would compel.

Note: Where, in action by transferee of note reciting that it was one of a series given for purchase price of land described in bond for title, it being agreed that if note sued upon was not paid at maturity it should become rent for land for certain year,

defendant's plea did not allege that amount of note was not fair rental for land, or was in excess of such legal damages for breach of contract as could be actually computed, no sufficient defense was interposed. 22 App. 223 (95 S. E. 724).

§ 4533. (§ 3936.) Lis pendens, notice by.

Cited. 143/75, 79 (84 S. E. 428).

Concluded transaction: Doctrine of lis pendens is not applicable to sale after proceeding in question has finally been passed upon. 146/63 (3) (90 S. E. 383).

Homestead: Doctrine of lis pendens does not apply to pendency of application to set apart homestead. 146/63 (3) (90 S. E. 383).

Doctrine of lis pendens does not apply to title or rights resting upon void homestead. 146/63 (3) (90 S. E. 383).

Injunction: Notwithstanding equitable petition seeking specific performance,

under doctrine of lis pendens, is notice protecting equities of petitioner, continuance of restraining order prohibiting sale or transfer of property or cutting of timber, etc., was not abuse of discretion. 149/166 (2) (99 S. E. 532).

Option: Where plaintiff obtained an option contract pending litigation between other party to contract and his vendor, but prior to decree, pending suit was notice, so that plaintiff would have been bound by any judgment duly prosecuted and not collusive. 149/126, 130 (99 S. E. 378).

§ 4534. (§ 3937.) Both parties.

Judgment: Party can not successfully ask for relief in equity to set aside judgment at law against him, on ground that he failed or omitted to make legal defense, unless he was

prevented by fraud or accident, unmixed with any fraud or negligence by himself, from setting up such defense. 148/799 (98 S. E. 467).

§ 4535. (§ 3938.) Purchaser without notice from one with notice, and vice versa.

Burden of proof: While bona fide purchaser for value or purchaser with

notice from bona fide purchaser takes free from existing equities, one set-

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ting up such equity has not the burden of proof unless such parties were purchasers for value. 144/16, 17 (5) (85 S. E. 1012).

Negotiable securities: Purchaser of negotiable note, although with notice either express or constructive of equities and defenses as between maker and original payee, is protected in his title and may recover on it, if he purchased, even without recourse,

§ 4536. (§ 3939.) **Laches.**

Stated. 147/340 (94 S. E. 219).

Administrator: Neither statute of limitations nor doctrine of equitable bar because of laches is applicable to action by heirs to recover land from daughter of deceased administrator who had held possession for twenty years and never administered it, defendant knowing the facts. 146/81 (90 S. E. 710).

Where, in suit for specific performance against administrator of decedent, date of death of decedent was not alleged, it can not be held on demurrer that plaintiff was barred by laches. 147/50, 52 (6) (92 S. E. 872).

Cancellation of deed: Where deed was made in January, 1896, and the grantor died in April of 1897, since which time grantees had been in possession, suit brought in 1910 by heirs of grantor to cancel such deed properly dismissed on ground of laches. 140/739 (1) (79 S. E. 782).

Deed: Wife continuing in possession of land not chargeable with laches in moving to cancel deed, though ten years may have elapsed since its execution. 140/678 (3-c) (79 S. E. 557).

Excuse: Equitable action for money paid for stock which plaintiffs were induced to buy by fraudulent representations was not barred by laches, though not brought for 18 months, where delay was due to promise to repay money. 143/84 (1) (84 S. E. 461).

Knowledge: It appearing that a deed was recorded in 1896, the same year that it was executed, by the administrator of deceased grantor, who was then clerk of the superior court, and that one of the grantor's heirs was

from one who took it, bona fide and without notice, from original payee. 21 App. 439 (1) (94 S. E. 629).

Personal property: Vendor of personal property impliedly warrants title thereto, and bona fide purchaser thereof for value, without notice of any infirmity in vendor's title, will be protected against loss on account of same. 24 App. 737 (1) (102 S. E. 178).

a witness to it, there was not such lack of knowledge on the part of the grantor's heirs as to save an action brought in 1910 to cancel such deed from being too late. 140/739 (2) (79 S. E. 782).

Mandamus proceedings to compel approval of bond was not barred by laches, where, though application was filed 10 months after beginning of term for which applicant was elected board during interval had arbitrarily refused to approve bond and office was vacant. 141/649 (81 S. E. 861).

Mortgage: Plaintiff was not estopped from enforcing mortgage *fi. fa.* on account of laches and lapse of time, where he did not seek any affirmative equitable relief and *fi. fa.* was not barred by limitations. 144/100 (4) (86 S. E. 241).

Second mortgagees of the Selma, Rome & Dalton Railroad company are estopped from foreclosing their mortgage in equity, because by the lapse of time and their laches it would be inequitable to allow them to enforce the legal rights claimed by them. 149/434, 435 (100 S. E. 380).

Partnership: Surviving partner here in action by heirs and legatees of deceased partner for accounting was not deprived of right to extra compensation for services because of statute of limitation. 147/178, 179 (2-b) (93 S. E. 289).

Reform deed: Suit to reform deed here brought 14 years after making of mistake was barred by laches. 142/357 (1) (82 S. E. 1057).

Equitable petition by remaindermen for reformation of deed and asking possession of certain land was

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not barred by laches, it appearing that defendant was in possession of land holding under life tenant, who died March 8, 1908, and who in her lifetime made second deed for sole purpose of correcting the error in the description as it affected the predecessors of defendant, service having been acknowledged on the petition on April 9, 1917. 149/151 (2) (99 S. E. 376).

Specific performance: Action for specific performance commenced January 3, 1913, was not barred by laches, covenantors having refused performance subsequent to February 1, 1908, in absence of showing that on ac-

count of lapse of time it would be inequitable to allow plaintiff to enforce his rights. 145/594 (3) (89 S. E. 693).

Taxation: County here complaining relative to taxation of realty lying on county line, was not guilty of laches barring right to relief against adjoining county. 142/576, 578 (4) (83 S. E. 217).

Trust: Action by plaintiffs in 1911, after death of wife in 1907, to recover as heirs of wife, their mother, their interest in property held in trust by husband was not barred by lapse of time. 143/607 (3) (85 S. E. 852).

§ 4537. (§ 3940.) **Which of two innocent persons to bear loss.**

Stated. 16 App. 706 (3) (86 S. E. 49); 17 App. 170 (1) (86 S. E. 434); 146/139 (1-a) (90 S. E. 855).

Applied. 24 App. 807, 808 (1-a) (102 S. E. 375).

Bill of lading: Where "order-notify" bill of lading required surrender of original order bill of lading, properly endorsed, before delivery of property, and shipper, by mistake, sent original bill of lading direct to "order-notify" party, unendorsed, and carrier delivered property to "order-notify" party, without requiring such endorsement, carrier was liable to shipper, the "order-notify" party having become insolvent without having paid purchase-price. 23 App. 309, 310 (4) (98 S. E. 106).

Note: Under this section and section 4526 if one apparently joint maker of note permitted other maker to take it to secure surety without notice that he was other than principal, he could not set up against surety that he also was a mere surety. 144/74, 75 (1-a) (86 S. E. 249).

It was not error to exclude evidence that defendant's delivery of

note to named person was due to an oversight, it not being disputed that plaintiff suffered by reason of such dereliction. 18 App. 150 (2) (88 S. E. 1000).

Where plaintiff received and accepted new note in lieu of principal sum claimed under original note, thereby releasing maker of original note and extending time of payment, mere fact that he may have attained possession of old note solely because sureties then failed to pay up interest due thereon would not affect his title to new note or operate to retain him title to principal sum called for under the old note. 23 App. 623, 628 (99 S. E. 156).

Stock: Certificate of stock in terms transferable only on books of corporation in person or by attorney on surrender of certificate, in accordance with by-laws of bank, makes applicable to defendant bank, claiming by-law lien of which transferee had no notice, principle of this section. 24 App. 435, 438 (101 S. E. 203).

§ 4538. (§ 3941.) **Common-law remedy.**

Stated. 148/548 (2) (97 S. E. 538).

Applied. 148/211 (96 S. E. 131).

Cancellation of deed: Petition alleging that a partnership, and partners composing the firm during certain year became indebted to petitioner in sum

of \$812, besides interest, for which sum petitioner obtained judgment against partnership and members thereof, upon which execution was issued and was unsatisfied, that one partner executed to his wife warranty

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deed to property at stated consideration of \$1,000, that property was worth many times that amount, that both firm and maker of deed were insolvent, and that conveyance was made with intent to delay, hinder or defraud creditors of partnership as well as creditors of such partner, among whom was petitioner, which intention was known to wife, was not subject to demurrer on ground that plaintiff had complete and adequate remedy at law. 149/763 (1) (102 S. E. 146).

Contract: Where verdict and decree in equity cause establish contract for maintenance of defendant, consideration for deed, and that such maintenance was to be furnished at plaintiff's home, and that plaintiff had not, to date of verdict and decree, breached the contract, but that defendant had voluntarily and without legal reason removed from the home of plaintiff, if defendant refused, without legal justification, to return to such home and to accept support subsequently to date of verdict and decree, plaintiff (defendant in justice's court suit) has legal defense to that suit, and her remedy at law is adequate. 148/68 (95 S. E. 683).

Corporation: One praying that corporation be required to accept from him certificate to shares of stock and to issue to him new certificate, and that he recover accrued dividends on said stock, etc., was without adequate and complete remedy at law, and was entitled to substantial relief prayed for. 148/97, 98 (3) (95 S. E. 975).

Crime: Where man has debauched minor girl and induced her to abandon parental abode and live with him in state of adultery and fornication, and persists in continuance of such conduct, equity will afford remedy by injunction, and to that end, in suit by father, will enjoin man from associating and communicating with the girl, either by writing, telephoning, or telegraphing, personally or through the aid or agency of any other person. 149/227 (1) (99 S. E. 861).

Injunction: As to general grounds of injunction, see § 5490 and notes. As to whether proceedings and process of

court of law will be enjoined, see § 5492 and notes.

Judgment: Where judgment at law is void for reason appearing upon face of record, and remedy at law is adequate, complete and available, equity will not afford relief. 148/159 (96 S. E. 260).

Where defendant had obtained judgment for purchase money, special lien being created on land, and levied upon land not subject to lien, and owner sued to enjoin enforcement of judgment and *fi. fa.*, court did not err in refusing injunction, petitioner having adequate remedy at law by filing claim for determination whether he took title free from lien of judgment. 148/615 (97 S. E. 670).

Mortgage: Where legal remedy of foreclosure is adequate chattel mortgage will not be foreclosed in equity. 144/353, 354 (2) (87 S. E. 274).

Notes: Where all rights of plaintiff as set out in petition to enjoin prosecution of certain suit against him in city court could be lawfully urged as defense to suit on note in such city court, it was error to dissolve restraining order, and to dismiss petition for injunction. 147/559 (94 S. E. 884).

Obstruction: On petition to enjoin threatened obstruction of private way not charging continuing nuisance, or defendant's insolvency, where evidence as to petitioner's breach of contract as to use of road was conflicting, judgment refusing injunction because of existence of common law remedy in court or ordinary was erroneous. 147/633 (3) (95 S. E. 232).

Quo warranto affords adequate remedy for trial of title to public office; and where title is sole issue, all equitable jurisdiction is ousted. 147/518 (1) (94 S. E. 1001).

Tax: Where plaintiff denied liability for amount of tax *fi. fa.* on ground that it was barred by limitations, also liability for interest charged in other *fi. fas.* on taxes falling due during periods which preceded issuance of such *fi. fas.*, on ground that there was no statutory provision for charging interest on taxes, and also upon all of the *fi. fas.*, on ground that they were void because prematurely issued, plain-

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tiff had adequate remedy at law under section 1041, and can not resort to equity. 148/86 (95 S. E. 963).

Title to property: Section 448 (oooo), Penal Code provides adequate remedy at law to promptly try question of

title where vehicles are seized while transporting liquors, and there is no ground for equitable jurisdiction. 148/110, 111 (2) (96 S. E. 1), 137 (2) (96 S. E. 2); 149/27 (98 S. E. 551).

§ 4540. (§ 3943.) **Concurrent jurisdiction.**

Stated. 147/465 (2) (94 S. E. 569).

Administration: Courts of equity have concurrent jurisdiction with courts of ordinary in administration of estates of deceased persons, in all cases where equitable interference is necessary or property to the full protection of rights of parties at interest. 147/465 (1) (94 S. E. 569).

Jurisdiction and power of ordinary is as broad as that of court of equity in settlement of estate. 20 App. 381, 382 (6) (93 S. E. 55).

While courts of equity have concurrent jurisdiction with courts of ordinary in administration of estates of deceased persons where equitable interference is necessary and proper for the full protection of rights of parties at interest, where court of ordinary first takes jurisdiction it will retain it, unless good reason be shown for interference of equity. 149/176, 181 (99 S. E. 624).

§ 4542. (§ 3945.) **Extent of jurisdiction.**

Corporations: Court of equity has no jurisdiction in this State to dissolve a corporation; sections 2238 et seq.,

provide how public and private corporations may be dissolved. 146/583 (3) (91 S. E. 665).

CHAPTER 2.

Of Discovery.

ARTICLE 1.

In Equitable Proceedings.

§ 4547. (§ 3950.) **Answer, how far evidence.**

Charge: Where plaintiff in his petition waives discovery except as to responses to certain interrogatories propounded, the court, in instructing upon effect of defendant's answer, should

distinguish between that part of answer which is merely part of pleadings and that part which is in response to interrogatories. 148/369 (8) (96 S. E. 962).

ARTICLE 2.

Discovery in Other Cases.

§ 4550. (§ 3953.) **Discovery at law.**

Nature of action: Discovery may be had from opposite party in any case,

legal as well as equitable, pending in any court. 148/548 (1) (97 S. E. 538).

Of accident and mistake.

§ 4554. (§ 3957.) **Privileged matters.**

Stated. 17 App. 787 (1) (88 S. E. 696).

CHAPTER 4.**Of Accident and Mistake.**§ 4567. (§ 3970.) **Error in form.**

Stated. 24 App. 86 (100 S. E. 46).
Deed: Where grantor delivered deed executed in blank and directed grantee's agent to insert description, and thereafter acknowledged deed and corrected description, equity in grantor's suit two years after sale with not reform deed because description omitted an exception of certain timber. 146/794 (3) (92 S. E. 534).

Petition here construed and held to set forth cause of action for recovery of plaintiff's share or pro rata part of proceeds arising from sale of parcels of land sold by defendant; for reformation of deed executed by plaintiff to defendant in so far as it affected his undivided interest in the land not disposed of by defendant;

and for injunction. 148/499 (97 S. E. 71).

Evidence of the character and value of improvements put upon land by the grantee after being put in possession was properly admitted in an action for reformation of a deed by supplying an omitted part of the description. 141/226 (3) (80 S. E. 713).

Note: Answer in suit on promissory note for purchase price of mare, alleging that while defendant's name appeared on said note as joint maker, he had no connection with the transaction and thought he signed note only as witness, but through oversight signed wrong line, which made him appear as joint maker, was properly stricken, it not alleging any defense. 24 App. 314 (100 S. E. 761).

§ 4568. (§ 3971.) **Rule of construction as to conditions.**

Consideration: Absolute deed of conveyance will not, at instance of grantor, be canceled merely because of breach by grantee of promise made by him, in consideration of which deed was executed. 146/197, 198 (3) (91 S. E. 13).

Sale: Where deed was executed and delivered, purporting to convey fee simple title to land, which, in granting clause provided that by accepting such deed the grantee agreed that he would not sell to any person whatever without first offering it to grantor at and for sum he paid for it, and that if grantor refused to buy, grantee might

sell to whomsoever he pleased, but that grantor's refusal must be in writing, such words in the deed were words of covenant upon part of grantee not to sell to another without written consent of grantor, and did not create conditional estate dependent upon condition subsequent. 149/587 (2) (101 S. E. 583).

Security deed: Where vendor agreed to surrender security deed and accept substitute, such covenant was not condition precedent, and remedy for breach of the covenant is an action for damages. 146/197, 198 (2) (91 S. E. 13).

§ 4569. (§ 3972.) **Volunteers.**

Cited. 147/318, 320 (93 S. E. 892).

§ 4570. (§ 3973.) **What is mistake.**

Ignorance: Where terms of instrument express intent of parties at time con-

tract is made, as they are then informed, in absence of any allegation

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of fraud, misrepresentation, or misplaced confidence, equity will not interfere to relieve on account of ignorance of a fact by one of the parties, if by exercise of due diligence he might have ascertained the truth. 147/318 (93 S. E. 892).

Pleadings: Petition as amended here presented case of mutual mistake in expressing certain matters, and in omitting other matters, from written contract that were intended to be expressed therein, as authorized decree of reformation in court of equity 148/469 (96 S. E. 1042).

§ 4572. (§ 3975.) **Parcl evidence.**

Notes: Terms of promissory note can not be defeated upon ground of mistake made at time instrument was executed, when it appears that it was not even intention of signer that settlement was to be accurate and final, but that under an oral agreement terms of instrument were to be varied and revised according to true state of facts that might thereafter appear. 22 App. 285 (95 S. E. 1016).

§ 4573. (§ 3976.) **Against whom equity relieves.**

Deed: Where one executes two security deeds conveying same property to different parties, grantee in second deed can not maintain suit in equity to re-

Proof: Evidence of mutual mistake will justify reformation of deed to land must be clear, unequivocal, and decisive as to the mistake. 146/679 (1) (92 S. E. 67).

Evidence here in action on note held to warrant judgment for plaintiff showing no mistake or failure of consideration. 146/120 (3) (90 S. E. 857).

Evidence to authorize decree reforming written instrument must be clear, unequivocal and decisive. 148/81 (2) (95 S. E. 973).

Answer filed in suit on promissory note for purchase price of mare, alleging that while defendant's name appeared on said note as joint maker, he had no connection with the transaction and thought he signed note only as witness, but through oversight signed wrong line, which made him appear as joint maker, was properly stricken, it not alleging any defense. 24 App. 314 (100 S. E. 761).

form first deed, although description may be incorrect and be due to mutual mistake of both parties. 146/527 (1) (91 S. E. 553).

§ 4575. (§ 3978.) **Ignorance of law.**

Stated. 140/148, 154 (78 S. E. 938).

§ 4576. (§ 3979.) **Mistake of law by parties.**

Stated. 140/148, 154 (78 S. E. 938).

Bidder: Heir who was bidder under family arrangement at administrator's sale, bidding under mistake of law and representations by administrator, a coheir, may refuse to pay bid, on discovery of mistake. 140/217 (2) (78 S. E. 903).

Insurance: Under facts here party was not entitled to reformation of contract with insurance company on

ground of mutual mistake of law. 145/787 (2) (89 S. E. 838).

Petition as amended here presented case of mutual mistake in expressing certain matters, and in omitting other matters, from written contract that were intended to be expressed therein, as authorized decree of reformation in court of equity. 148/469 (96 S. E. 1042).

§ 4577. (§ 3980.) **By the draftsman or agent.**

Description: Where a deed is defective in description, due to a mistake of the scrivener, and the grantee has been placed in possession, and has

made permanent improvements, he is entitled to reformation of the instrument. 141/226 (2) (80 S. E. 713).

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§ 4578. (§ 3981.) **Reforming a contract, etc.**

Charge: Where the court properly charged as to character of proof required to authorize reformation of deed upon ground of mistake, it was not necessary to repeat the rule of evidence in dealing with the contentions of the parties and the burden resting on plaintiff. 141/437, 438 (3) (81 S. E. 129).

Description: Deed of executrix could not be reformed as to description so as to enforce previously executed option to sell, invalid under section 4035. 142/434, 435 (4) (83 S. E. 105).

Deed, executed by executrix as individual and by certain others, could not be reformed as to description where it was executed voluntarily in addition to deed of executrix, and there was no evidence that the parties intended to make any other conveyance. *Id.*

Employment contract: Allegations of amendment to defendant's answer in action by employee for wrongful discharge here were insufficient to entitle defendant to have the employment contract reformed. 143/101 (2) (84 S. E. 465).

Evidence: While, in action for reformation of instrument, plaintiff's evidence as to mistake need not exclude all reasonable doubt, it should be clear, unequivocal, and decisive. 141/437, 438 (2) (81 S. E. 129).

Joint defendants: On petition to reform release executed to one defendant, after it had been voluntarily reformed by one defendant in accordance with original intent of parties, it was

error to enjoin defendants from using it as a defense. 147/349 (94 S. E. 218).

Make verdict: While equity will, in a proper case, so reform a deed that it will conform to the contract of sale, it will neither make a contract for the parties nor so reform the deed that it would defeat the contract. 140/259, 262 (78 S. E. 897).

"More or less:" Where by consent of both parties the words "more or less" were omitted from deed of executrix, deed could not be reformed on theory of mistake. 142/434 (3) (83 S. E. 105).

Parties: Defendant in trover suit can not, by amendment to answer equitable in nature, have reformed written instrument which he relies upon to define character of his possession of property in controversy, without making person who executed instrument party to the case. 147/479 (1) (94 S. E. 561).

Petition alleging that plaintiff was uneducated and had little experience in business, was demurrable here, it not alleging that plaintiff was illiterate or that he was entitled to reformation of instrument. 144/502 (87 S. E. 659).

Where petition to have warranty deed declared to be security deed did not allege that petitioner could not read, or that any fraud was practiced which excused her from reading the instrument which she signed, petition was subject to general demurrer. 149/42 (99 S. E. 115).

§ 4579. (§ 3982.) **Cancel for mistake of one, when.**

Cited. 146/431, 434 (91 S. E. 405).

Charge: Whether or not, on application to reform deed on ground of mutual mistake, it imposed greater burden on complaining party than law provides, to instruct jury that in order to find for complainant they must believe beyond reasonable doubt that deed was result of mutual mistake before grantor and grantee, as alleged, evidence here being insufficient finding

that there was such mutual mistake, charge, if erroneous, was not cause for reversal. 146/679 (1) (92 S. E. 67).

While equity has jurisdiction to reform written instruments, where there has been mistake by one of parties, accompanied by fraud on part of other party, there was no error, in view of evidence here, in failure to charge this principle of law on theory of erroneous understanding of contract by

Of accident and mistake.

defendant, known to plaintiff at time of its execution. 20 App. 470, 471 (4) (93 S. E. 111).

Ignorance: Where terms of instrument express intent of parties at time contract is made, as they are then informed, in absence of any allegation of fraud, misrepresentation, or misplaced confidence, equity will not interfere to relieve on account of ignorance of a fact by one of the parties, if by exercise of due diligence he might have ascertained the truth. 147/318 (93 S. E. 892).

Petition as amended here presented case of mutual mistake in expressing certain matters, and in omitting other matters, from written contract that were intended to be expressed therein, as authorized decree of reformation in court of equity. 148/469 (96 S. E. 1042).

Petition here praying for cancellation of deed held to set out cause of action. 149/548 (4) (101 S. E. 124).

Record of instrument not properly recordable not canceled as matter of course, in absence of statute; right will be determined under general law governing right to have instruments canceled. 140/48 (4) (78 S. E. 467).

§ 4580. (§ 3983.) Mistake of fact.

Deed: Direction of verdict was unauthorized here in suit against defendant in fi. fa. and sheriff to reform deed so as to describe land on which purchaser had entered. 147/372 (94 S. E. 252).

Ignorance: Where terms of instrument express intent of parties at time contract is made, as they are then informed, in absence of any allegation of fraud, misrepresentation, or misplaced confidence, equity will not interfere by relief on account of ignorance of a fact by one of the parties, if by exercise of due diligence he might have ascertained the truth. 147/318 (93 S. E. 892).

Insurance policy: Where on application for policy of liability insurance duly authorized agent of insurer agrees to issue policy as applied for, at stated premium and to cover specified liabilities, but by fraud or mistake of agent policy is issued at higher pre-

Reformation: Equity will not reform written contract because of mistake on part of complaining parties as to contents of writing, and because of fraud alleged to have been practiced by other party in procuring scrivener who drafted written contract, and in whom complaining parties had entire confidence, to omit therefrom stipulation alleged to have been agreed upon, no fiduciary or confidential relation existing between the parties, and no sufficient excuse appearing why complaining parties did not read contract. 149/518 (101 S. E. 118).

Title: Purchaser of land in undisturbed possession under absolute warranty deed can not have rescission and recover from grantor partial payments made on purchase price, or have damages covering costs of improvements on land, solely upon ground of defect in title; such relief depends upon grantee's equitable right of rescission or cancellation, which does not exist unless he allege that grantor is insolvent or a non-resident, or allege fraud, mutual mistake, or some other fact making it inequitable for grantor to hold purchase money paid and to collect balance. 146/749 (2) (92 S. E. 213).

mium and with broader liabilities, and is delivered to applicant by insurer, who collects premium specified in preliminary agreement, and applicant retains policy without discovering mistake until expiration of yearly term, equity will so reform policy as to make it accord with oral agreement between parties. 147/63 (92 S. E. 931).

Land: Where mortgage on realty is executed in favor of named person but by mistake contains description of land different from that intended to be mortgaged, mortgage prior in date upon land intended to be covered by mortgage first referred to will, where recorded prior to date of commencement of suit to reform junior mortgage so as to make it cover land intended to be mortgaged, have priority over junior mortgage. 146/797 (92 S. E. 524).

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Where, under neither pleadings nor evidence was issue made as to whether there was mistake in description of land conveyed by common grantor to plaintiff's predecessor in title, court was not authorized to charge that de-

fendants contended that in the deed under which the plaintiff holds the boundaries given therein were unintentionally misstated. 148/62 (2) (95 S. E. 709).

§ 4581. (§ 3984.) **Negligence and concealment.**

Ignorance: Where terms of instrument express intent of parties at time contract is made, as they are then informed, in absence of any allegation of fraud, misrepresentation, or misplaced confidence, equity will not interfere to relieve on account of ignorance of a fact by one of the parties, if by exercise of due diligence he might have ascertained the truth. 147/318 (93 S. E. 892).

Read contract: Law will not relieve parties from results of their negligence in failing to read contract which was not made under disability or an emergency or induced by fraud of other party. 18 App. 258 (2) (89 S. E. 381).

Fact that party tendering contract to be signed stated that it was duplicate of former contract did not relieve other party from reading it. 18 App. 258 (2) (89 S. E. 381).

§ 4582. (§ 3985.) **Mutual ignorance, etc.**

Cited. 147/318, 321 (93 S. E. 892).

§ 4583. (§ 3986.) **Execution of power, remedied.**

Stated. 140/467, 476 (79 S. E. 124).

§ 4584. (§ 3987.) **Equity may set aside judgments.**

Attorney: Verdict for defendant in suit by plaintiff to set aside judgment rendered against her, in absence of attorney employed by her, without any showing why defense to action was not filed, was proper. 143/729 (85 S. E. 869).

Consent decree or judgment: Where homestead was levied on under judgment against firm, claim interposed by head of family, member of firm, and consent judgment rendered finding part of land subject, burden is on beneficiaries to show such judgment void for fraud. 144/442 (87 S. E. 470).

Petition by children of partner to recover homestead was demurrable

in absence of allegations that judgment was void or voidable. Id.

Fraud: Judgment against defendant may be set aside where assurances that the suit would be dismissed operated as a fraud and caused defendant not to file pleas in time. 142/834 (83 S. E. 942).

On demurrer to equitable petition to set aside judgment for fraud, court could not look to answer to sustain demurrer. Id.

Pleading: Allegations of fraud relied on to set aside judgment rendered in city court were insufficient where they were mere conclusions, without any statement of facts to sustain them. 147/119 (2) (92 S. E. 939).

CHAPTER 5.

Of Account and Set-Off.

§ 4586. (§ 3989.) **Account.**

Adequate and complete: Where full and complete remedy for settlement of accounts can be had at law, equity is

ousted of its jurisdiction. 19 App. 79 (3) (90 S. E. 1038).

Evidence: Where defendants agreed

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to dispose of plaintiff's land, satisfy a debt and account for balance, deeds by such defendants, after having bought in land at sheriff's sale, were admissible. 145/179, 180 (5) (88 S. E. 937).

While under the facts defendant was liable only for one-half the rents received by him, nevertheless evidence of value of premises, of quantity of crops ordinarily and generally grown thereon, and of fair and reasonable value of premises for rent, was admissible as tending to show amount actually received by defendant as rents. 149/225, 226 (2) (99 S. E. 884).

Husband and wife: Petition in equitable action brought by widow, alleging death of husband intestate, without lineal heirs, seized and possessed of certain lands, that petitioner is sole heir, has paid all debts with possible exception of one to defendants, defendants' possession and conveyance of such land, her willingness to pay balance of any indebtedness and tender thereof, and seeking accounting as to amount paid on indebtedness and rents of land, set forth cause of action against all defendants. 148/675, 676 (2) (97 S. E. 856).

Jurisdiction: Where, properly construed, petition for accounting under contract to pay royalties on certain patented roofing, made plain action at law based on contract, notwithstanding prayer for discovery, accounting, and relief in equity, equity has no jurisdiction. 148/548 (5) (97 S. E. 538).

Where accounting sought is neither mutual nor complicated, and no fiduciary relation between the parties is alleged, equity has no jurisdiction. 148/548 (4) (97 S. E. 538).

Mutual accounts: When account is mutual as matter of law and when mutuality is question for jury stated. 14 App. 299 (1) (80 S. E. 698).

Account may be shown to be mutual by evidence of conduct of parties or such course of dealing as will support inference that there was mutual understanding that each would continue to credit other until one indicated desire to terminate course of dealing and to withdraw tacit agreement. Id. 229 (2).

Parent and child: Where testator bequeathed to his wife and two sons all his property, share and share alike, and directed that it be kept together and not sold for twenty years after his death, and it was left entirely discretionary with widow what annual allowance she should make to the son, a son who had become of age and who had married and moved away from the estate, could enforce demand for payment to him of portion of net income from estate, in equitable suit seeking accounting and ascertainment of amount due him. 149/725 (3) (101 S. E. 793).

Partnership: Court of equity has jurisdiction in all cases of an accounting and settlement between partners. 149/217 (1) (99 S. E. 854).

Pleading: General demurrer to petition here in action by administrator to have title to certain land decreed to be in him and to have accounting for rents, issues, and profits was properly overruled. 149/225, 226 (1) (99 S. E. 884).

Petition alleging facts showing that plaintiff and defendant each owned half interest in mill, and to be entitled to profits after payment of purchase price, and defendant's refusal to account to plaintiff and withholding of entire partnership property, stated cause of action for appointment of receiver, to pay off partnership indebtedness, and for accounting, and payment of any profits to each entitled thereto. 149/754 (2) (102 S. E. 159).

Rents and profits: One entering into possession of land under deed from pretended purchaser under power of sale in security deed, who had notice that property was not exposed for sale at time and place specified in advertisement, holds possession subject to right of grantor in security deed, and her successors in title, to have accounting for rents and profits derived from the land, and to have so much thereof as may be necessary to discharge secured debt credited thereon, and, when debt should be extinguished, the property, to return to the grantor or her successors in title. 149/825 (2) (102 S. E. 526).

Net profit which defendant realized from cultivation and use of land was

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not the sole measure of his liability on accounting. 149/825 (6) (102 S. E. 526).

Security: Where sureties agreed with principal debtor to dispose of his land, satisfy his debt, and account for balance and they bought in land at sheriff's sale, they were accountable for advanced price received by them at subsequent private sale. 145/179, 180 (6) (88 S. E. 937).

§ 4588. (§ 3991.) **Contribution.**

Employee: Act of railroad company in operating train along private track and under dangerously low shed maintained by oil mill company, without warning employee who was killed, amounted to actual participation in proximate cause of homicide rather than mere legal, passive acquiescence in negligence of oil mill company in maintaining shed in dangerous condition, and railroad company could not recover from oil mill company amount of judgment paid for homicide of employee. 23 App. 346 (2) (98 S. E. 256).

Note: Suit at law, without equitable features, to enforce contribution by joint makers of promissory notes who have paid off same against one jointly alleged to be liable who has paid nothing, neither plaintiffs' petition nor defendant's answer alleging facts to bring case within jurisdiction of court of equity, will be transferred by Supreme Court to Court of Appeals, latter court having jurisdiction. 148/249 (96 S. E. 338).

Person jointly liable with another upon promissory note or other like obligation, and therefore equally bound with him to bear the common burden, is entitled to contribution from his joint obligor, should he be compelled to discharge the common liability. 18 App. 128 (1) (88 S. E. 899).

In suit for contribution against

Trustee in bankruptcy: Where plaintiff sued for an accounting and a decree that title to land was in him, and pending action he became bankrupt, final decree should declare the amount to be due by the bankrupt and authorize its payment, and that on making of such payment his trustee should have title executed to him, or on termination of bankruptcy to person succeeding to plaintiff's right to the land. 141/73 (4) (80 S. E. 316).

joint maker of promissory note, whether one of plaintiffs had in fact procured from other joint makers amount contributed by giving such joint maker, joint personal note, and whether such note had ever been paid, was immaterial. 24 App. 80 (3) (100 S. E. 34).

In suit against joint maker of promissory note for contribution brought by other joint makers, evidence showing indebtedness on part of one of plaintiffs to one of banks for whose benefit note was given was immaterial. 24 App. 80, 81 (4) (100 S. E. 34).

Tort: Where one of two or more joint tort-feasors has been sued for and compelled to satisfy damages arising from jointly tortious transaction, he can not, as general rule, maintain action either for contribution or indemnity over against those connected with him in tort. 23 App. 346 (1) (98 S. E. 256).

Where liability of tort-feasor in original suit arises merely from negative acts of omission, such as failure in his duty to inspect, and proximate cause of injury, so far as joint tort-feasors are concerned, lay in active, positive acts of negligence on part of other tort-feasor, in which original defendant did not participate, general rule does not apply. *Id.* 23 App. 346 (1) (98 S. E. 256).

§ 4591. (§ 3994.) **Party must surcharge and falsify.**

Definition: Amount stated is an agreement between persons who have had previous transactions fixing the amount due in respect thereto and promising payment. 144/646 (1) (87

S. E. 915), citing 1 Words & Phrases 93; 21 App. 194, 195 (1) (94 S. E. 83).

Duty: In a case where requirements of action on stated account are met, defendant, in order to dispute correct-

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ness of amount so alleged to be due, would have to surcharge and falsify; that is, he must allege the omissions and deny the correctness of the items rendered. 21 App. 194, 196 (94 S. E. 83).

Failure of consideration: Where petition in suit as on an "account stated" not only fails to allege necessary promise to pay, but, by embodying written agreement relied on, shows within itself that no such promise was in fact made, demurrer to answer that articles furnished proved worthless, and pleading failure of consideration under the

contract, was properly overruled. 21 App. 194, 195 (1) (94 S. E. 83).

Fraud: Where account is stated by creditor, and debtor gives his promissory note in settlement, and is grossly negligent in failing to inform himself as to elements of account, he will not be allowed to plead, as a defense to action upon the note, that certain items in the account for which he was not legally liable were fraudulently placed therein, where his plea does not show that any trick or artifice was used to prevent him from discovering the fraud. 21 App. 100 (1) (93 S. E. 1023).

§ 4593. (§ 3996.) Equitable set-off.

Bank: Receiver of bank takes assets and choses in action of such bank subject to any equitable set-off which defendant in action by the receiver might have urged against the corporation itself. 20 App. 36 (3) (92 S. E. 397).

City court has no jurisdiction to grant affirmative equitable relief, and therefore can not allow claim *ex delicto* to be set off against claim *ex contractu*. 14 App. 84 (2) (80 S. E. 341).

Judgment: While in appropriate case indebtedness on open account may be set off against judgment when holder of such judgment is insolvent, it is not abuse of discretion to refuse injunction to restrain levy of *fi. fa.*, because amount of alleged equitable set-off was less than amount of judgment, and there was no tender of the difference. 146/180, 181 (2) (91 S. E. 21).

Non-residence: In distress warrant proceeding by purchaser of title pending lease as agent for original landlord, exclusion of defendant's evidence to show that original landlord was not

resident could not have been harmful to defendants, where they supplied no valid testimony showing alleged contract for services on which set-off was based, but at time of alleged sale themselves claimed that title had passed out of plaintiff. 24 App. 509, 510 (2) (101 S. E. 304).

Non-residence of plaintiff who submits himself to jurisdiction of courts of this State affords equitable ground for filing by defendant of plea of set-off. 24 App. 663 (101 S. E. 768).

Mere fact that plaintiff and partnership debtor of defendant are non-residents does not amount to such a "special equitable circumstance" as will take case out of general rule and authorize equitable set-off. 24 App. 663 (101 S. E. 768).

In suit by individual, answer that plaintiff was member of non-resident partnership, and alleging claim against partnership for breach of contract between it and defendant, was demurrable. 24 App. 663, 664 (2) (101 S. E. 768).

CHAPTER 6.

Of Administration of Assets.

§ 4596. (§ 3999.) Interfering with administration.

Applied. 147/739 (95 S. E. 231).

Distributive shares: In cases of real difficulty in construing will, or in dis-

tributing assets, in ascertaining persons entitled, or in determining under what law property should be divided,

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personal representative may ask direction of court of equity; but direction of court can not be invoked by legatee or heir unless such direction is essential to protection of legacy or distributive share, or is necessary as foundation for recovery by legatee or heir of legacy or distributive share. 147/465, 466 (5) (94 S. E. 569).

Fraud: This section authorizes equitable relief to non-resident claimants against fraudulent administration of decedent's estate. 232 Fed. 921, 923 (13).

Injunction will not issue to restrain payment by administratrix of amount found by arbitrators to be due, on ground of fraud, this section affording a legal remedy to correct any illegality. 148/176 (96 S. E. 214).

Judge: Where superior court judge has become disqualified, any other superior court judge may grant equitable relief provided for against wrongful administration. 232 Fed. 921, 923 (14).

Judgment: Under issues made and the facts here, it was office of judgment and decree, and not of verdict of jury (which was special in its character and in answer to questions submitted), to fix dignity and priority in payment of amount due and payable under item of will creating legacy; hence ground of motion for new trial complaining of failure of verdict to establish such priority was without merit. 149/340 (3) (100 S. E. 106).

Payment: Where testator bequeathed to his wife and two sons all his property, share and share alike, and directed that it be kept together and not sold for twenty years after his death, and it was left entirely discretionary with widow what annual allowance she should make to the son, a son who had become of age and who had married and moved away from the estate, could enforce demand for payment to him of portion of net income from estate, in equitable suit seeking accounting and ascertainment of amount due him. 149/725 (3) (101 S. E. 793).

Petition here to enjoin temporary administrators from management of estate and for administration of estate

in equity did not set forth facts sufficient to authorize court of equity to interfere with regular administration. 148/543, 544 (2) (97 S. E. 623).

Where demurrer to petition for administration of estate in equity was improperly overruled, error in overruling demurrer rendered nugatory subsequent order of court appointing permanent receivers to administer the estate in court of equity. 148/543, 544 (2) (97 S. E. 623).

General demurrer to petition here in action by administrator to have title to certain land decreed to be in him to have accounting for rents, issues, and profits was properly overruled. 149/225, 226 (1) (99 S. E. 884).

Under facts in record, no grounds were shown by petition here for interference by court of equity with administration of estate. 149/422 (1) (100 S. E. 375).

Qualifying: Fact that one who had been appointed administrator by court of ordinary was served with petition and temporary restraining order thereon, before he gave bond, took oath, and had letters of administration issued to him, did not authorize court of equity to enjoin him from qualifying as administrator and receiving his letters. 149/176, 180 (99 S. E. 624).

Strong case: As general rule, court of equity will not interfere with regular administration of estate by the representative; and to authorize such interference, facts must clearly show there is good reason for so doing. 149/699 (1) (101 S. E. 806); 147/465 (4) (94 S. E. 569).

Title: As general rule, court of equity will not interfere with regular administration of estate by administrator; but where one is interested in title to certain real estate in hands of administrator, and has intervening equities therein not reached by law, and is liable to suffer loss unless court of equity intervenes, court of equity will interfere to prevent such loss. 149/783 (2) (102 S. E. 145).

Will: Superior court, exercising equity jurisdiction, has authority to construe wills, and to declare devices contained therein void when contrary to

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law. 141/390, 391 (2-b) (81 S. E. 238).

Petition here by administrator of legatee against administrator cum testamenta annexo of will for construction of the will and for decree re-

quiring payment of certain money, with intervention by heirs of such legatee, which set forth their interests and prayed decree distributing the estate, etc., stated a cause of action. 149/340 (1) (100 S. E. 106).

§ 4597. (§ 4000.) Petitions for direction.

Legatees: In cases of real difficulty in construing wills, or in distributing assets, in ascertaining persons entitled, or in determining under what law property should be divided, personal representative may ask direction of court of equity; but direction of court can not be invoked by legatee or heir unless such direction is essential to protection of legacy or distributive share, or is necessary as foundation for recovery by legatee or heir of legacy or distributive share. 147/465, 466 (5) (94 S. E. 569).

There was no error in dismissing on general demurrer petition in equity filed by legatee praying that trial of appeal in superior court be enjoined, that assets of estate be marshaled, that realty be sold for purpose of reimbursing petitioner for money expended for costs, counsel fees etc., and that will be construed, and estate distributed. 147/465, 466 (6) (94 S. E. 569).

§ 4598. (§ 4001.) Marshaling assets.

Collateral attack: Where directors of bank, in order to prevent run upon bank and to preserve its assets for creditors and stockholders alike, petition court of equity for appointment of receivers, and bank itself, its stockholders, and creditors are duly made parties, such stockholders will not be heard to question, by collateral attack, authority and jurisdiction of court to appoint receivers and to marshal and distribute assets of bank. 148/854 (98 S. E. 491).

§ 4600. (§ 4003.) Creditors' petitions.

Cited. 146/383, 390 (91 S. E. 463).

Judgment: Property in one person's hands can not be subjected to another's general debt unless it has been reduced to judgment or there is a proceeding coincidently to reduce

Parties: Only representative of the State may ask for direction of court. 147/399 (94 S. E. 227).

Petition: Under petition here construed as one by legatee for recovery of property devised, construction of will may be invoked as basis for such recovery, but petition must allege that administrator has assented to devise, or wrongfully refuses to assent. 147/399 (94 S. E. 227).

Removal of cause: Suit in superior court by administrators for directions in distribution of estate is part of or ancillary to probate proceedings, and is not removable into Federal court. 257 Fed. 823.

Will: The superior court, exercising equity jurisdiction, has authority to construe wills, and to declare devices contained therein void when contrary to law. 141/390, 391 (2-b) (81 S. E. 238).

Corporation can not maintain equitable suit to marshal its own assets; and appointment of receiver under such proceeding, over objection of creditors, is error. 142/34 (1) (82 S. E. 464). See 142/796 (83 S. E. 782).

Parties: Corporation can not, as plaintiff, maintain equitable suit to marshal its own assets, and appointment of receivers under such a proceeding, over objection of creditors or stockholders, duly made, is error. 148/854 (98 S. E. 491).

it to judgment. 143/703 (1) (86 S. E. 780).

Time: Fact that copy of referee's order, attached by amendment to petition seeking to subject bankrupt's exempt property to debts and stating

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that his exemption had been set apart, showed that order was dated after filing of original petition, did not render original petition demurrable as prematurely filed. 143/229 (1) 84 S. E. 477).

Title: Evidence in creditor's bill here was insufficient to make prima facie case of title to the land in the debtor as heir or devisee of his father. 142/422 (1) (83 S. E. 99).

CHAPTER 7.

Of Charities.

§ 4603. (§ 4006.) **Charitable bequest.**

Cited. 147/633, 634 (1) (95 S. E. 210).

§ 4604. (§ 4007.) **Cy pres.**

Education: Devise of estate "to be invested in safe securities, and the income arising therefrom to be used for the purpose of educating poor, worthy girls of good families and legitimate," is not void for alleged reason that

designation of girls to be benefitted is so indefinite and uncertain as to render their identity impossible, and that the kind, amount, and quality of education to be bestowed is not ascertainable. 149/361 (100 S. E. 103).

§ 4605. (§ 4008.) **Subjects of charity.**

General Note.

Education: Devise of estate "to be invested in safe securities, and the income arising therefrom to be used for the purpose of educating poor, worthy girls of good families and legitimate," is not void for alleged reason that des-

ignation of girls to be benefitted is so indefinite and uncertain as to render their identity impossible, and that the kind, amount, and quality of education to be bestowed is not ascertainable. 149/361 (100 S. E. 103).

CHAPTER 8.

Of Election.

§ 4609. (§ 4012.) **Election.**

Ejectment: In action of ejectment wherein two demises are laid, not error to refuse motion to require plaintiff to elect on which demise he will rely for recovery. 145/184 (2) (88 S. E. 949).

Judicial sale: One who defers prosecution of his remedy under forthcoming bond until after he has claimed fund arising from sale, under judicial process, of property the production of which the bond was given to secure,

is confined to his election, and is estopped to assert the invalidity of the sale. 18 App. 77 (2) (89 S. E. 163).

Title: Fact that petition, claiming ownership, asked that deed by which plaintiff had conveyed the land be set aside, and also alleged that the land had been reconveyed to her, did not require election, as invoking inconsistent remedies by setting up title and denying title. 142/322 (1) (82 S. E. 1069).

Of execution of powers.

CHAPTER 9.

Of Execution of Powers.

§ 4614. (§ 4017.) Jurisdiction over powers.

Appointment: Power here given to wife by husband's will extended only to nomination of certain persons from a class, and the apportionment of property among her appointees, who would become, under the donor's will, subject to the terms, conditions, and limitations therein imposed upon each appointee. 140/467 (2) (79 S. E. 124).

Where quantity of interest to be taken by appointee is expressly limited by instrument creating power, and donee is only authorized to appoint the property over which estate is to ride, appointment of interest exceeding that intended to be given to appointee is tantamount to an exercise of the power of appointment to the extent of the power. *Id.*

§ 4616. (§ 4019.) Collusive execution.

Reference to power: Where donee of power to apportion property, etc., executes will devising the specific property in parcels to appointees selected from the proper class, such

will is to be regarded as an act indicative of donee's intention to execute the power. 140/467 (1) (79 S. E. 124).

§ 4620. (§ 4023.) Power of sale in deeds of trust, etc.

Stated. 140/798, 799 (80 S. E. 12).

Burden: Where, under state of record, it is impossible to determine scope of power of sale in security deed with such certainty as to pass upon validity of sale as matter of law, and burden being upon plaintiff attacking such sale, judgment refusing interlocutory injunction will not be disturbed. 148/513 (1) (97 S. E. 441).

Condition: Provision of will, "In event that said daughter should die without children, then I invest and clothe her with the right to dispose of said property by deed, will, or otherwise as she may think proper," contemplated that donee might execute the power at any time during her life, effect thereof to be postponed until her death, at which time contingency upon which existence of power depended must have happened: 149/752, 753 (3) (102 S. E. 351).

Attempt by donee to execute power before happening of contingency would not render her act invalid, if contingency actually happen. *Id.*

Executor: Petition here in action against defendant as executor, and seeking judgment against him as such, generally against the estate of testator,

and specially against certain land described in a deed executed by such executor, for money loaned to operate farms of the estate, set out cause of action, and it was erroneous to dismiss action on general demurrer. 147/444 (94 S. E. 556).

Guardian: Power in will here to executor and guardian to sell land conferred on them only such power as the ordinary could confer to sell upon application, and dispensed with necessity of such order from the ordinary, but all other requirements in order to make same valid remained same as in cases of public sale. 148/77, 78 (2) (95 S. E. 865).

Life tenant: Where testator devised land to his son for life, with remainder to his children living at time of his death, and empowered life-tenant to sell timber on land, deed by life-tenant to such timber is to be construed as in execution of the power. 141/653 (1) (81 S. E. 1119).

Deed from life-tenant giving grantee 20 years within which to cut and remove timber conveyed, and 10 years additional continually, was not necessarily in violation of power conferred by will to sell timber with

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right in purchaser to have reasonable time within which to cut and remove it; what would constitute reasonable time being question of fact, to be decided in light of attendant circumstances. *Id.* 653, 654 (2).

Where will created life estate in widow of testator, with remainder to his children, and widow, who was named as executrix, sold property of estate at private sale without order authorizing sale, her deed conveyed only the life estate, and did not divest the children of their interest in the remainder. 148/44 (2) (95 S. E. 682).

In deed where power is given to trustee to sell real estate with written consent of life tenant, such consent is for benefit of life tenant only, and as to such consent the life tenant does not occupy fiduciary position to the remainderman. 148/712 (3) (98 S. E. 472).

Where testator devised life estate to his daughter, with power of disposal if she die without children, and during lifetime daughter attempted to convey entire estate in fee for valuable consideration, with warranty of title, inference arose that daughter intended by executing such deed to convey full fee simple title, and her right to do so depended upon her dying without issue. 149/752, 753 (4) (102 S. E. 351).

Mortgagee: Sale here under power by mortgagee in possession as lessee was void under this section for irregularity and bad faith. 221 Fed. 736 (1).

Where mortgage executed by life tenant under will to secure promissory note made by her to third person did not refer to powers expressed in will, it was not an execution of such powers. 147/472 (2) (94 S. E. 563).

Notice: Grantee of a deed given to secure a debt and containing a power of sale need not notify the grantor of his intention to sell, where the deed provides for no other notice than advertising in a given manner. 141/63 (1) (80 S. E. 312).

One entering into possession of land under deed from pretended purchaser under power of sale in security deed, who had notice that property was not

exposed for sale at time and place specified in advertisement, holds possession subject to right of grantor in security deed, and her successors in title, to have accounting for rents and profits derived from the land, and to have so much thereof as may be necessary to discharge secured debt credited thereon, and, when debt should be extinguished, the property to return to the grantor or her successors in title. 149/825 (2) (102 S. E. 526).

Ordinary: Concurrence of ordinary was necessary here to proper exercise of testamentary power of sale. 143/756 (3) (85 S. E. 917).

Possession: Under a power of sale in a deed to secure a debt, authorizing the grantee to take possession of and sell property, after advertising it in a certain manner, the grantee was not required to take possession of the land in order to effect a valid sale. 141/63 (2) (80 S. E. 312).

Sale: Under allegations of petition here praying cancellation of deed and that petitioner recover possession of lands conveyed by such deed, petitioner was not entitled to relief prayed for, and court did not err in dismissing the petition on demurrer. 148/117 95 S. E. 980).

Security deed: Where one executes deed to secure debt and creates power of sale in grantee, and latter subsequently transfers evidences of debt in form of notes and transfers security deed by indorsing thereon "For value received I hereby transfer the within mortgage deed to" named person, but does not execute further conveyance to transferee, latter is not vested with legal title and can not exercise power of sale. 146/93 (90 S. E. 713).

Trust to married woman for life, with remainder to her surviving children, became executed immediately upon delivery of deed, but did not extinguish power of sale conferred on trustee, when empowered by wife, of selling life estate. 147/5, 6 (2) (92 S. E. 514).

Provision of trust deed empowering trustee to sell trust estate conferred power to sell interest of life tenant in land in which she had reinvested the trust fund, and purchaser at second sale and his successors acquired title

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to life estate. 147/5, 6 (3) (92 S. E. 514).

Deed by which grantor conveyed land to one in trust for separate use of his wife for life, with "reversion" to trustee or "her heirs or heirs at law" empowering wife to authorize trustee in writing to sell estate and reinvest proceeds, authorized the trustee, when duly empowered, to sell and convey in fee simple the land described, notwithstanding there were minor children then in life. 147/493 (1) (94 S. E. 765).

Where trustee under deed executed deed of conveyance and cestui que trust executed writing empowering trustee to sell and ratifying the sale, such deed conveyed the entire estate conveyed by the deed to the trustee. 147/493 (2) (94 S. E. 765).

Where grantor conveyed land in

trust for himself and wife for life, with remainder over on death of survivor, and directed trustee, on wife's written request, to convey on such terms as she directed, power contemplated only bona fide and valid sale for sufficient valuable consideration, and did not authorize conveyance as a gift or upon a nominal consideration. 147/761 (95 S. E. 289).

Power of sale in trust deed empowering the trustee as often as he may think and deem best, to sell and reinvest proceeds or to exchange the same and execute titles therefor and to receive and accept titles, all to be done without any order of court, authorized trustee to sell entire estate in land, and hence substituted trustee conveyed fee simple title to grantee by her deed. 148/712 (5) (98 S. E. 472).

CHAPTER 10.

Of Fraud.

§ 4621. (§ 4024.) Jurisdiction over fraud.

Will: Equity has concurrent jurisdiction with courts of law in all cases of fraud except in execution of will. 232 Fed. 921, 924 (18).

Probate proceedings pending on

appeal in superior court can not be disposed of by separate suit to declare will void and for merger of pending probate proceedings. 145/603, 604 (2) (89 S. E. 700).

§ 4622. (§ 4025.) Actual and constructive fraud.

Bankruptcy: Discharge in bankruptcy does not relieve bankrupt from liability upon actions for fraud or for obtaining property by false pretenses or false representations. 20 App. 664 (1) (93 S. E. 255, 40 A. B. Rep. 161).

Charge on actual and constructive fraud in substantially the language

of this section, was not erroneous. 142/51 (3) (82 S. E. 449).

Deceit: Many of the Code provisions found under the head of "Fraud" and dealing generally with the question of fraud are applicable in an action for deceit; charge here giving precise language of this section was not error. 20 App. 374, 378 (4) (93 S. E. 20).

§ 4623. (§ 4026.) Misrepresentation.

Charge: Where, in action on insurance policy, it did not appear that plaintiff made misrepresentations as to insured stock, prior to issuance of policy, this section should have been omitted from charge. 144/783, 784 (3) (87 S. E. 1077).

In action for damages for false

representations, conceding that it was error to read to jury this section, it was harmless in view of other instructions. 214 Fed. 168 (3).

Deceit: Many of the Code provisions found under the head of "Fraud" and dealing generally with the question of fraud are applicable in an action for

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deceit; charge here giving precise language of this section was not error. 20 App. 374, 378 (4) (93 S. E. 20).

Diligence: Where one purchasing land has opportunity to examine it before buying, but, instead of doing so, voluntarily relies upon statements of vendor concerning its character and value, contract will not be rescinded or set aside, or purchase price abated, because of falsity of statements, unless some fraud or artifice was practiced by vendor to prevent such examination; this is true although vendee may have acted upon misrepresentations of vendor or his agent. 19 App. 16 (1) (90 S. E. 742).

Charge that if purchaser has equal opportunities with seller for discovering dimensions of lot sold, and both parties act in good faith, he is bound to avail himself of such opportunity, and, further, if agent of defendant did not act in good faith, but was guilty of actual fraud, the rule would be otherwise, notwithstanding both parties may have had equal opportunity to judge the dimensions, was not erroneous. 19 App. 795 (1) (92 S. E. 290).

Where petition directly alleged that defendant, in exercise of ordinary diligence, should have discovered falsity of statements alleged to have been made by him with reference to value of stock, and he failed to file a demurrer, he can not justly complain of charge that if defendant recklessly, and without inquiring into the facts or exercising ordinary diligence to know the facts, and without knowledge of the facts, recklessly made representations to plaintiff to induce him to buy the stock, and these representations were false, and plaintiff acted upon them, the jury would be authorized to find for plaintiff. 20 App. 374, 380 (6) (93 S. E. 20).

Insurance: If, when sale of policy of insurance was effected, vendor, by her

agent, expressly stated that unexpired term extended for four and a half years, and accepted payment on that basis, purchaser had right to rely upon that statement as forming part of contract of purchase, it being shown that seller retained possession of policy, and it not appearing that policy was present at the time. 19 App. 401, 410 (5) (91 S. E. 579).

Jury: While questions as to truth and materiality of representations are generally for determination of jury, yet where all testimony excludes every reasonable inference but one, issue becomes one of law for court. 23 App. 191, 192 (3) (97 S. E. 879).

Opinion: Statement by seller's agent of value of corporate stock sold, being a mere matter of opinion, could not amount to such fraud, though untrue, as entitled buyer to avoid the sale. 13 App. 772, 774 (80 S. E. 32).

Representations by plaintiffs that defendant could occupy peaceably the rented premises without objection on part of third persons living in that locality could not have amounted to more than expression of personal conviction, and could not have amounted to guarantee that adjacent property holders might not thereafter object to occupancy of premises by defendant. 19 App. 18 (1-a) (90 S. E. 742).

Where express representations constituting part of contract are made by seller as to existence of fact, in contradiction to statement of mere opinion or judgment, purchaser ordinarily has right to rely thereon. 19 App. 401, 410 (5) (91 S. E. 579).

Stock: Breach of seller's oral promise, that stock of corporation would be sold only in Georgia, afforded no ground for rescission by the buyer, where such breach did not lessen the value of the stock, or affect any of the buyer's rights. 13 App. 772, 775 (80 S. E. 32).

§ 4624. (§ 4027.) **Suppression of the truth.**

Charge: Where, in action on insurance policy, it did not appear that plaintiff made misrepresentations as to insured stock, prior to issuance of

policy, this section should have been omitted from charge. 144/783, 784 (3) (87 S. E. 1077).

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§ 4625. (§ 4028.) **Fraud, how consummated.**

Deceit: Many of the Code provisions found under the head of "Fraud" and dealing generally with the question of fraud are applicable in an action for

deceit; charge here giving precise language of this section was not error. 20 App. 374, 378 (4) (93 S. E. 20).

§ 4626. (§ 4029.) **Slight evidence sometimes sufficient.**

Stated. 144/550 (1) (87 S. E. 651).

Charge that fraud may not be presumed, but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence, was not error. 18 App. 402 (2) (89 S. E. 625).

Circumstances: Fraud may be established by circumstances, as well as by positive proof, and much latitude is allowed in introducing evidence for such purpose. 24 App. 727, 728 (2) (102 S. E. 192).

Fraud being of peculiarly subtle nature, slight circumstances may be sufficient to establish it; this rule is particularly applicable where fraud is charged in family transaction. 24 App. 727, 728 (2) (102 S. E. 192).

Deceit: Many of the Code provisions found under the head of "Fraud" and dealing generally with the question of fraud are applicable in an action for deceit; charge here giving precise language of this section was not error. 20 App. 374, 378 (4) (93 S. E. 20).

§ 4627. (§ 4030.) **Confidential relations.**

Stated. 14 App. 666, 667 (3) (82 S. E. 60).

Agency: Relationship of principal and agent demands entire good faith of agent to principal, and any breach of loyalty resulting in advantage to agent will, at principal's instance, void contract between them, procured by such breach. 15 App. 1 (2) (82 S. E. 381).

Where agent presents to his employer for approval contract made in employer's behalf with third person and relating to business and purposes of his employment, but also containing stipulation foreign to subject matter of lease and concerning rights and interests of employer and agent as to matters arising out of the contract, employer will not be bound to agent by his approval of stipulations thus embraced in the writing, unless he had actual knowledge that it contained such provision. 23 App. 290, 291 (3) (98 S. E. 224).

Bank: Where officers of bank obtained loan from another bank on notes signed by them as individuals, and, at their request proceeds were credited to their bank, which thereafter became insolvent, it was not liable on such notes. 146/799 (92 S. E. 525).

Charge here on confidential relations, substantially in language of this sec-

tion, was not erroneous. 142/51 (3) (82 S. E. 449).

Guardian and ward: Where infant sought to establish resulting trust in land belonging to her mother's estate purchased by her uncle, who subsequently became her guardian, there being no fiduciary relation between parties at time of purchase and no contractual relation of principal and agent, refusal of instructions based on theory existing fiduciary relation was proper. 146/528 (1) (91 S. E. 772).

Parent and child: Son who protected and assisted aged mother at sale of land under a fl. fa. issued from a justice court, and loaned her the money to make the purchase, estopped to assert that mother did not obtain title to land. 140/318 (78 S. E. 1066).

Stepparent: Relation of stepmother and stepchild is not confidential one; at least confidential relation does not necessarily exist. 147/609 (1) (95 S. E. 4).

Where intestate left widow and three adult children by a former marriage, who informed stepmother of her right to year's support, etc., and suggested friendly division of property and they relied on her promise to let them know her decision, she was bound to advise them of her decision. 147/609 (2) (95 S. E. 4).

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§ 4628. (§ 4031.) Confidential relations preventing acquisition of adverse rights.

Cited and applied. 145/750, 757 (89 S. E. 1071).

Parent and child: Son who protected and assisted aged mother at sale of land under a fi. fa., issued from a jus-

tice court, and loaned her the money to make the purchase, estopped to assert that mother did not obtain title to land. 140/318 (78 S. E. 1066).

§ 4629. (§ 4032.) Fraud annuls deeds, judgments, etc.

Administrator: Where judgment of court of ordinary authorizing sale of lands by administrator is attacked for fraud, and it is sought to have canceled deed made by administrator to purchaser, and also deed made two or three years later by purchaser, conveying to said administrator the same property, purchaser at that sale is necessary party to petition for cancellation of deeds, etc. 147/610 (2) (95 S. E. 3).

Charge: It was erroneous to charge that in proceeding to set aside conveyance on ground of undue influence, in order to sustain such conveyance it should be made to appear that the transaction was fair, honest, and free from fraud and undue influence, there being no confidential or fiduciary relations between the parties. 148/238 (3) (96 S. E. 327).

It was error to charge, on issue of fraud and undue influence, that if there is any evidence of fraud or undue influence, the conveyance should not be sustained. 148/238 (4) (96 S. E. 327).

Charge that question as to whether deed was forgery involved question of fraud, and that fraud may not be presumed, but, being subtle in its nature, slight circumstances may be sufficient to carry conviction of its existence, was not erroneous in that it misled and confused the jury. 149/397, 398 (5) (100 S. E. 447).

Consideration: Absolute deed of conveyance will not, at instance of grantor, be canceled merely because of breach by grantee of promise made by him, in consideration of which deed was executed. 146/197, 198 (3) (91 S. E. 13).

Evidence that grantor stated three years before conveyance that she

built house in particular way because grantee wanted it so, and the land was his after her death, was admissible. 142/360 (1) (82 S. E. 1070).

Evidence that grantor had other property was admissible on the reasonableness of her disposition of the property in controversy. Id. 360 (2).

Evidence that grantor stated that she put the property in grantee's hands to avoid possible judgment was inadmissible. Id. 360, 361 (4).

Evidence in suit for cancellation of deed, release, and order for cancellation of judgment, held to authorize verdict against defendants. 148/99, 100 (2) (95 S. E. 964).

Slight evidence of fraud and undue influence may authorize jury to cancel deed, and is sufficient burden to grantee and require him to show that transaction was fair and free from fraud and undue influence. 148/238 (4) (96 S. E. 327).

In case between strangers in blood, and where no fiduciary or confidential relation is alleged or proved, it is stating rule too strongly against defendant to charge that deed should not be sustained if there is any evidence, however slight, however strongly rebutted, however opposed by great preponderance, of fraud or undue influence. 148/238 (4) (96 S. E. 327).

Guardian and ward: Guardian's suit on behalf of wards against a former ward to set aside award of property in proceeding for division in kind, in which no fraud or notice of claim of irregularity in proceedings was alleged against purchasers or mortgagees, was properly dismissed on demurrer. 146/482 (91 S. E. 542).

Maintenance: Where verdict and decree in equity cause established contract for maintenance of defendant,

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consideration for deed, and that such maintenance was to be furnished at plaintiff's home, and that plaintiff had not, to date of verdict and decree, breached the contract, but that defendant had voluntarily and without legal reason removed from the home of plaintiff, if defendant refused, without legal justification, to return to such home and to accept support subsequently to date of verdict and decree, plaintiff (defendant in justice's court suit) has legal defense to that suit, and her remedy at law is adequate. 148/68 (95 S. E. 683).

Negligence: Petition in action to cancel deeds on ground that they were procured by fraud held to show that plaintiff was so negligent in executing such deed that equity would not aid her in setting them aside. 144/576 (87 S. E. 772).

Non-resident: Petition to cancel deed for fraud of grantee was properly dismissed on general demurrer where defendant had conveyed the land to non-resident before action was brought or his pendens filed. 146/372 (91 S. E. 119).

Parent and child: Petition alleging that father of plaintiffs had been induced by fraud and intimidation to convey real estate and to transfer promissory notes to son-in-law, thereby committing wrong and injury to plaintiffs and their brothers and sisters, and against father himself, father still being in life, and praying that deed and transfer of notes be declared void, that defendants be enjoined from cutting timber on land, and be enjoined from collecting said notes, and that

receiver be appointed, was subject to general demurrer. 146/686 (92 S. E. 213).

Pleading: Allegations of fraud relied on to set aside judgment rendered in city court were insufficient where they were mere conclusions, without any statement of facts to sustain them. 147/119 (2) (92 S. E. 939).

Petition praying for cancellation of deed, release, and order for cancellation of judgment, held to state cause to action as to all defendants 148/99, 100 (1) (95 S. E. 964).

Allegations in petition that "upon learning" of misrepresentation of vendor as to amounts of outstanding debts, vendee applied to vendor to have deed canceled, and that vendor promised to do so, but had failed to move in the matter, otherwise than to request vendee to bring action himself to have instrument canceled, was sufficient as against general demurrer complaining that it did not appear that action was commenced promptly after discovery of misrepresentation. 149/555 (2) (101 S. E. 177).

Petition here held not to show upon its face that any further tender or offer to restore status on petitioner's part was necessary, as condition precedent, for decree of cancellation of deed. 149/555 (3) (101 S. E. 177).

Tender: Where fraud was practiced upon plaintiff by securing her signature to a deed which she never had agreed to make, she was not compelled to tender money expended by defendant in obtaining year's support for her as condition to setting the deed aside. 145/865 (90 S. E. 73).

§ 4630. (§ 4033.) Inadequacy of consideration.

Mental ability: Contract may be set aside in equity where great inadequacy of consideration is joined with great disparity of mental ability;

principle is applicable whether consideration be payment of money or rendition of services. 145/373 (2) 89 S. E. 415).

§ 4632. (§ 4035.) Fraudulent trade-marks, etc.

Accounting: Allegations and prayer for accounting are incidental and appropriate to relief by way of injunction. 148/326, 331 (4) (96 S. E. 627).

Fraternal order: Equity will enjoin in-

dividuals or a corporation that are using the name, insignia, and emblems of a benevolent and fraternal association to injury of latter. 148/403 (1) (96 S. E. 871).

Of specific performance.

CHAPTER 11.

Of Specific Performance.

§ 4633. (§ 4036.) Specific performance, when decreed.

Adoption: Parol obligation to adopt child, accompanied by virtual, though not statutory, adoption, and acted on for many years, may be enforced in equity by decreeing child entitled to deceased obligor's property undisposed of by will. 144/571 (1) (87 S. E. 782).

Answer: It was not error to permit answer in suit by one claiming, under contract of adoption, property of adopting parent not disposed of by will, to be amended to set up that plaintiff and deceased became estranged and disavowed any relationship. 144/571, 572 (3) (87 S. E. 782).

Assignment: Where insurance company refused to grant extension of policy after demand and compliance with stipulated conditions as to payment of premiums, specific performance at instance of assignee was available remedy. 148/757, 758 (3) (98 S. E. 266).

Bond for title must be surrendered before delivery of deed will be required of obligor, unless it is shown that it can not afterwards be enforced against him. 13 App. 112 (1-a) (78 S. E. 942).

Charge that if plaintiff surrendered voluntarily bond for title that would end her claims was not erroneous here, parties having stipulated that if plaintiff did not surrender such bond, note for price had been paid, but if she did surrender such bond, that was settlement. 145/252, 253 (3) (88 S. E. 974).

Court having charged as requested by plaintiff's attorney that jury will look to all surrounding facts in determining circumstances under which bond for title was surrendered, and whether or not they allowed plaintiff to still remain in possession of land, it was not erroneous to add "and whether plaintiff remained in possession under an agreement to purchase, or as a tenant." Id. 252, 254 (4).

It was not error to refuse interlocu-

tory injunction in suit by transferee of bond for title, to enjoin suit instituted by payee of purchase-money notes, seeking to set up special lien on entire tract, and to compel obligor to convey to transferee designated portions of entire tract, which transferee had caused to be surveyed, and to which deed was demanded on basis of applying, as full consideration for land designated in survey, all of a portion of the purchase money which had been paid to vendor. 147/478 (3) (94 S. E. 564).

Where one in possession of land under contract not fully executed sold land for another with consent of his vendor, vendor executing bond to make title to second vendee on payment of agreed price, and agreeing that second vendee should have possession at stated time, in suit by last named against obligor in bond for title, to enforce specific performance and other equitable relief, court did not err in making first vendee a party defendant. 149/166 (1) (99 S. E. 532).

Charge: Where court's charge in submitting terms of contract specific performance of which was prayed was full, apposite, and correct, sufficiently covering the subject, it was not error to refuse to give charge requested upon such subject. 148/774 (4) (98 S. E. 477).

Where court's charge in suit for specific performance of contract to make will in favor of another as to what the contract was and whether it was made or not was sufficiently full and comprehensive, court did not err in refusing to give requested charge on such subject. 148/774 (5) (98 S. E. 477).

Conditions: Provision in contract for exchange of land that vendee should assume a loan was for the vendee's benefit, and he having alleged readiness to comply and tender of deed of property he was to convey, with

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deed for defendant's signature containing assumption of the debt, his petition was not demurrable on ground that it did not appear that condition had been complied with. 142/157 (2) 82 S. E. 530).

Consideration: Agreement to convey certain described real estate to vendee in consideration of conveyance of certain other real estate by vendee is on such a valuable consideration as will support contract. 147/30 (5) (92 S. E. 636).

Continuous duties: Court of equity will not decree specific performance of contract which requires discharge of continuous duties over long period of time, in order to compel obedience to its decrees. 147/730, 732 (1) (95 S. E. 225).

Contract: Where contract for sale of land is in writing signed by both parties, is certain and fair, is for adequate consideration, and capable of being performed, it may be specifically enforced. 141/703 (1) (82 S. E. 21); 145/828 (1) (90 S. E. 64).

Allegations in petition to compel specific performance tending to show that contract was obtained by fraud or duress were demurrable. 141/825 (82 S. E. 132).

Equity will not decree specific performance of contract for sale of land where it is not clear that exact terms of contract were agreed upon and understood. 142/350 (82 S. E. 1058).

Whether contract be such as is provable by parol or is required by statute of frauds to be in writing, it must be certain and unequivocal in all essential terms either within itself or by reference to some other agreement or matter, or it can not be specifically enforced; certainty required must extend to all particulars essential to enforcement of contract. 149/727, 728 (2-a) (102 S. E. 27).

Decree: That purchaser had agreed to pay portion of price on certain day and give his note for balance did not preclude vendor, after such date and default of purchaser, from obtaining decree for specific performance limited to exigencies of case. 141/703 (1-b) (82 S. E. 21).

Dedication: Petition here to compel dedicators to execute deed to land dedicated for use of public school and which public had built on and was using for school purposes stated cause of action. 144/688 (2) (87 S. E. 917).

Petition was not demurrable for failure to describe land with sufficient certainty. *Id.*

Description of land here could not be declared as matter of law so uncertain that it could not be made basis of decree for specific performance. 140/128 (1) (78 S. E. 714).

Description of land here in contract of sale was not too vague and uncertain to form basis of decree for specific performance, though vendor described such land merely as "my place adjoining W. T. Mosher S. E." 141/557 (1) (81 S. E. 852).

Petition against seller of land to compel specific performance of contract of sale was not demurrable on ground that contract was too vague to be specifically enforced, where description was sufficiently definite to admit of parol evidence to fix boundaries of property. 141/618 (81 S. E. 867).

Description of property as "my property, consisting of 85 acres more or less," in certain county and district, words quoted *prima facie* meant that seller had distinct tract of about 85 acres located at place designated. *Id.*

Description in contract for sale of land as the "Humphrey Place," containing 330 acres, more or less, was not so vague and indefinite as to render contract unenforceable, where it could be applied to subject-matter by extrinsic proof. 141/703, 704 (2) (82 S. E. 21).

Where contract for sale or exchange of land was headed "Atlanta, Ga., June 7, 1912," and described the property as "401 Spring, known as the Cob Home, 50x160 more or less," it was not too indefinite to preclude specific performance. 142/157 (1) (82 S. E. 530).

Description, in agreement to convey "certain real estate of the plaintiff known as No. 48 Angier Ave" in

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certain city, named county, Georgia, is not so indefinite as to render it void for uncertainty and subject to general demurrer. 147/30 (3) (92 S. E. 636).

Description in agreement to convey, "certain tract of land located in T. county, State of Georgia, in the 4th land district, and being one hundred and thirteen and one-half acres from the east side of land lot 54, all of land lot 49, six acres in the immediate northeast corner of land lot 21, 112 acres from land lots 20 and 21; said tracts comprising approximately four hundred acres, and being the same property as described in deed recorded among T. county records in Book 10, p. 656, and known as the Roberts place," is not so indefinite as to render it void and subject to general demurrer. 147/30 (4) (92 S. E. 636).

Trial court, in suit for specific performance, erred in refusing to allow amendment to petition, more fully describing land in controversy, and in rejecting certain bond for title, together with evidence offered to identify the land. 147/118 (1) (93 S. E. 81).

Where original contract, by way of description of land, referred to certain bond for title, it was not error for trial court to reject deed executed by maker of bond for title, when offered in evidence. 147/118 (2) (93 S. E. 81).

Specific performance of contract for sale of land will not be decreed unless land which is subject matter of alleged sale is clearly identified in the contract. 147/478 (1) (94 S. E. 564).

Description in the paper will be sufficient if by aid of extrinsic evidence it can be definitely applied to particular land; as corollary to this rule, description of land will not be sufficient if paper does not definitely describe land or express data by which land might be definitely located by aid of extrinsic evidence. 147/478 (1) (94 S. E. 564).

Stipulation to give a deed to any number of acres, in bond for title which provided, "Seller of above-described property agrees to give a deed to any number of acres on the

payment of full pro rata part still due on said acres," refers to quantity of land for which purchaser might demand deed, but does not describe any particular fraction of the land to which deed should be made, or give any data from which any particular land might be located by aid of extrinsic evidence. 147/478 (2) (94 S. E. 564).

Injunction: Notwithstanding equitable petition seeking specific performance, under doctrine of lis pendens, is notice protecting equities of petitioner, continuance of restraining order prohibiting sale or transfer of property or cutting of timber, etc., was not abuse of discretion. 149/166 (2) (99 S. E. 532).

Where suit by married woman for specific performance of contract to convey land is pending, and defendant sues out warrant to evict plaintiff's husband (with whom plaintiff resides) as tenant holding over, injunction will issue at instance of plaintiff, to restrain execution of warrant, if it appear that suit for specific performance is prosecuted in good faith and is well founded. 149/727 (1) (102 S. E. 27).

Issues determined: Purchaser here claiming right under municipal ordinance to conveyance by municipality of another lot called an "extension," might in suit for specific performance have the rights of the parties as to the extension determined. 145/828 (3) (90 S. E. 64).

Land: Not error to charge that vendor would not be bound to convey any tract of land other than that sold and that performance would not be decreed if her offer to do that had been refused. 142/344 (1) (82 S. E. 1059).

Nonsuit: Where there was no evidence of lawful tender of the purchase price, or of waiver of tender, nonsuit was proper. 141/31 (4) (80 S. E. 318).

Option: Where by terms of option contract optionor obligates himself to sell described lands upon payment of purchase price on day fixed, optionee, in order to raise binding promise on part of optionor to sell, must make his election and offer to perform within

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time stipulated in option contract. 149/147 (99 S. E. 301).

Parties: Specific performance of a joint bond for title can not be decreed in an action to which one of the obligees is not a party. 141/114 (3) (80 S. E. 625).

Equitable suit to enforce parol contract of adoption against estate of adopting parent was maintainable by child, without bringing in name of his natural parent, who was party to contract. 144/571 (1) (87 S. E. 782).

Bank interested in sustaining judgment was necessary party defendant in error in suit for accounting and specific performance against bank and another. 146/718 (1) (92 S. E. 211).

Personal services: Equity will not generally enforce specific performance of contract for personal services which are material or mechanical in character. 140/743 (1) (79 S. E. 846).

Specific performance of contract involving skill, judgment, and discretion, continuous in character, and running through a period of ninety-nine years, will not be decreed. *Id.* 743 (2).

Petition in vendor's action to enforce specific performance alleging notice by defendant of refusal to perform or offer to perform on compliance by defendant with contract, and to account for rents and profits, was not subject to general demurrer. 141/703, 704 (4) (82 S. E. 21).

Petition here was held subject to general demurrer. 142/350 (82 S. E. 1058).

Petition here in equitable action by purchasers for specific performance not demurrable on ground that it did not sufficiently specify that plaintiffs approved the title. 143/205 (2) (84 S. E. 451).

Petition containing no prayer for general relief construed, and held that only relief sought was that plaintiff specifically perform contract by executing deed, or in lieu thereof that plaintiff have money judgment. 144/117, 118 (1) (86 S. E. 249).

Petition in suit by child, claiming under contract of adoption against administrator of estate of adopting parent to secure property undisposed of

by will, was not demurrable, though plaintiff did not expressly pray for specific performance. 144/571 (2) (87 S. E. 782).

Paragraph was not demurrable for failure to state terms of alleged contract and when it was made. *Id.* 571, 572 (4).

Petition here for specific performance of provision in option in lease to purchase at certain price was not subject to general demurrer. 145/312 (4) (89 S. E. 214).

Where allegations in petition for specific performance were mingled and connected with other allegations, it was improper to strike averments which left remainder uncertain, and rendered complaint subject to special demurrer here. 145/828 (4) (90 S. E. 64).

Allegations that plaintiffs' deceased brother had purchaser land to be owned in common, that plaintiffs contributed to the payment, not knowing that title was in brother individually, with prayer for general relief, were not sufficiently definite to raise question of specific performance. 146/431 (2) (91 S. E. 406).

Failure of petition for specific performance of contract to allege that contract was in writing can not be taken advantage of by demurrer; such failure raises no presumption that contract exists only in parol. 147/30 (2) (92 S. E. 636).

Petition here sufficiently alleged waiver of tender of agreed price and of deed for execution. 148/480 (4) (97 S. E. 74).

Petition here in suit by administrator for specific performance was not subject to demurrers filed. 149/241 (1) (99 S. E. 869).

Petition alleging agreement between parties to purchase certain land, securing of verbal option by petitioner, agreement by defendant to pay certain purchase price, giving mortgage to secure money borrowed, and further alleging that petitioner should have a half interest in such land, that he improve and manage the land for the joint account of himself and defendant, receiving no compensation for his services, and turning over to defend-

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ant his share of the profits, to be applied to extinguishment of the debt, set forth cause of action for specific performance. 149/363 (1) (100 S. E. 108).

Petition in suit for specific performance of contract by which decedent agreed that if petitioner would work for him so long as decedent should live, etc., decedent would make a will and leave his entire property to petitioner, which did not allege value of the lands or value and extent of services, was not sufficient to support decree for specific performance. 149/367 (100 S. E. 110).

Possession: Where vendor alleged in petition for specific performance that purchaser refused to receive possession, and that thereupon it became necessary for him to retain possession, and that he had offered to account for the rents, etc., to execute bond for title or deed, this could be adjusted by decree. 141/703 (1-c) (82 S. E. 21).

Premature: Where contract to sell land provided that purchase-money should be paid when deed was executed, and reserved right to execute conveyance on or before May 15th, suit commenced on May 12th was prematurely brought, though defendant had refused to accept purchase-money tendered. 141/557 (2, 3) (81 S. E. 852).

Reservation in deed here was too indefinite and uncertain to constitute basis for specific performance thereof. 145/811 (89 S. E. 1082).

Service: Mere constructive service did not give court jurisdiction to grant relief by specific performance, which operated only against person of non-resident defendant. 144/117, 118 (2) (86 S. E. 249).

Tender of cash must be made by proposed purchaser, unless it is waived. 140/719 (2) (79 S. E. 775).

Before specific performance of contract for sale of land will be decreed, there must be, in the absence of waiver, an unconditional tender of the purchase price; offer to pay purchase price on delivery of properly executed deed is not an unconditional tender. 141/31 (2) (80 S. E. 318).

Where an offer to pay the price on delivery of a deed was declined by the administratrix of the deceased obligor, who stated that the heirs were dissatisfied with the sale, such statements did not dispense with the necessity of a lawful tender. *Id.* 31 (3).

Mere statement, in amendment to petition, of an offer to pay or a willingness to pay, does not take the place of a tender where no reason excusing tender is alleged. 141/114 (2) (80 S. E. 625).

Specific performance will not be decreed in the absence of unconditional tender of purchase price; tender is excused if vendor by conduct or declaration proclaims that if tender should be made acceptance would be refused. 142/344 (2) (82 S. E. 1059).

Where seller places it beyond his power to perform obligation under contract of sale, no tender before suit by the other party, able and willing to perform, is necessary. 145/312 (2) (89 S. E. 214).

Tender before suit may be excused on part of one party to contract, claiming right to purchase land, able and willing to perform, where other by conduct or declaration proclaims that if tender should be made acceptance would be refused. 145/312 (2) (89 S. E. 214).

Where offer to pay did not include reimbursements for expenditures for rents for certain years, petitioner was not entitled to decree of specific performance. 149/589, 590 (3) (101 S. E. 582).

Time not essence of contract, delay of four years and seven months in tendering purchase-money not bar specific performance by holder of bond for title on making proper tender. 140/128 (2) (78 S. E. 714).

Equitable petition by one of two joint obligees in a bond for title was demurrable where the date of the purchase of the property covered by the bond was neither exactly nor approximately alleged. 141/114 (4) (80 S. E. 625).

Title: Where contract for sale of two separate and distinct parcels of land

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for lump consideration stipulated that if title to either parcel should not be good, and could not be made so, trade to be void and canceled, purchaser can not have specific performance, where vendor had no title to one of the parcels. 145/682 (89 S. E. 780).

Where purchaser is entitled to receive title enabling him to hold land free from probable claim by another, and where question of whether such title is tendered to him is fairly debatable, equity will not force vendee to perform. 145/866 (90 S. E. 57).

Voting trust: Petition to enforce specific performance of a voting trust, construed as petition for specific performance of contract for holding and voting of stock of private corporation, and plaintiff is not entitled, under prayer for general relief, to any relief which is not consistent with case made by petition and germane to its prayer for specific performance. 147/730, 732 (2) (95 S. E. 225).

Will: Nonsuit held properly granted here in action against administrator of widow alleged to have been sole heir at law of deceased husband and

against her heirs for specific performance of parol contract entered into by her deceased husband to make petitioner sole beneficiary in will. 147/495 (94 S. E. 767).

Specific performance of contract to make will in favor of another, where party claiming right to specific performance has performed his part of contract, will be decreed where contract is shown with requisite degree of certainty and definiteness. 148/774 (1) (98 S. E. 477).

It was proper to refuse charge that specific performance of contract to make will in favor of another would not be enforced where refusal to enforce it would not amount to fraud on party seeking such performance. 148/774 (2) (98 S. E. 477).

Portion of court's charge, in suit for specific performance of contract to make will, in which he states issues as to agreement on part of decedent as to what he would leave by his will upon certain consideration stated, was not misleading but correctly presented real issue. 148/774 (6) (98 S. E. 477).

§ 4634. (§ 4037.) Parol contract for land.

Administrator's sale: Agreement that one should purchase land at administrator's sale and take deed, and that on other's payment of price he would execute bond conditioned to convey the land, was within statute of frauds and equity will not decree specific performance. 146/822 (92 S. E. 635).

Charge: Partial blending of this section and section 4151, though likely to be misleading, plaintiff in error here not injured, the only effect being to place a heavier burden on plaintiff than the law imposes. 140/380 (2) (78 S. E. 928).

Plaintiff having rested her prayer for specific performance upon contention that there had been a parol gift, possession under the gift, and substantial improvements, and that there was an agreement amounting to a contract of sale and purchase under which she had entered into possession and made valuable improve-

ments, and there was no evidence to support the theory of parol gift, etc., the court should have confined the jury to the allegations of contract of sale and purchase and to the evidence thereon. 140/661 (1) (79 S. E. 568).

It was error to refuse to charge, in suit for specific performance, that there could be no recovery by petitioner until she had proven to jury's satisfaction, by preponderance of evidence, clearly and strongly and so satisfactorily as to leave no reasonable doubt, that there was an express contract for conveyance by will to petitioner of specific property named in bill, in consideration of certain services, and that such services were rendered and performed. 148/394, 395 (3) (96 S. E. 1006).

Consideration: Allegation of surrender by plaintiff to widow of decedent of his equitable right in estate of decedent held sufficient allegation of

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consideration to support contract by her to convey land to plaintiff at her death, so that contract after performance by former was enforceable. 147/50, 51 (2) (92 S. E. 872).

Evidence: To entitle plaintiff to decree for specific performance of parol contract for sale of land, contract must be established to a reasonable certainty, and a consideration must be clearly and satisfactorily proved; but, if plaintiff relies upon possession with valuable improvements, it must be established by clear and satisfactory evidence to have been made with reference to the contract. 140/661 (3) (79 S. E. 568).

Specific performance of parol contract to sell land should be denied unless contract and its consideration is clearly shown. 144/546 (4) (87 S. E. 668).

Evidence here in suit for specific performance of parol contract for sale of land showed that complainant had made partial payments and had been admitted into possession, and also improved the land. 240 Fed. 751 (1).

On trial of suit based on parol gift of land, of which it is sought to recover possession, and for specific performance, and to cancel deeds as clouds upon title, it is not error to charge that before jury would determine equitable title passed by reason of gift, so as to entitle plaintiff to specific performance, they must be satisfied beyond reasonable doubt that there was gift of specific tract of land, and delivery of that land, as set out in petition. 147/136 (1-a) (93 S. E. 92).

Court erred in giving instruction which authorized jury to find for defendant upon contention that plaintiff had agreed in parol to convey certain tracts of land, if they should find that plaintiff had shown his contention in regard to this alleged parol contract by preponderance of evidence, true rule being that in order for plaintiff to have specific performance of parol contract, under alleged circumstances, it was necessary for him to establish contract by evidence so clear as to leave no reasonable

doubt as to agreement. 147/219 (2) (93 S. E. 215).

Parol contract for land of which specific performance is sought should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement. 148/394 (2) (96 S. E. 1006).

Where specific performance is sought for enforcement of parol contract for sale of lands, contract and terms thereof should be established so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement. 148/575 (97 S. E. 523).

Full performance by purchaser, including payment or tender of price, is essential to his right to compel specific performance of parol contract for sale of land, though he went into possession and erected valuable improvements on faith of such contract. 141/478 (1) (81 S. E. 210).

Improvements: Complainant who, having entered into possession of land with his mother-in-law, remained after she left under parol contract to purchase from owner, is, having made valuable improvements and paid all, or nearly all, of the purchase price, entitled to specific performance of the contract. 246 Fed. 236 (1); s. c. 158 C. C. A. 396).

It was error to overrule ground of demurrer that plaintiff failed to allege in equitable petition that she made permanent improvements on land sued for, before filing original petition, and subsequently to time when relation of landlord and tenant terminated, and after relation of vendor and vendee existed, and while she held possession as such. 146/689 (92 S. E. 57).

Limitation: Where services are to be performed in consideration of oral agreement to compensate by devise in will of person for whom services are to be performed, cause of action does not accrue until death of promisor and failure to make devise according to terms of contract. 145/682, 683 (6) (89 S. E. 749).

Part performance: Equity will specifically enforce parol agreement, by terms of which one person is to perform certain services during lifetime of

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other, and latter is to convey certain land at or before his death in consideration of such services, if contract be definite and specific, based upon full or partial performance of consideration in way of services performed on one side and failure or refusal to perform on other, and proof of contract be clear, strong, and satisfactory. 149/767 (2) (102 S. E. 131).

Parties: Where administrator sought specific performance, alleging that intestate had contracted for purchase of two lots constituting northern half of certain tract of land, that defendant, son of intestate, had purchased from same owner two lots constituting southern half of such tract, and had taken deed conveying entire tract, including four lots referred to, to his mother and himself jointly and that after date of deed he had recognized right and title of mother to the two northern lots and agreed to convey same to her, petition was not demurrable because grantor in deed to defendant was not party to petition. 146/643 (1) (92 S. E. 42).

Partition: Parol agreement between tenants in common for partition of land held by them as such, when carried out by parties taking exclusive possession in severalty according to agreement, may be confirmed and enforced by decree. 146/819 (92 S. E. 632).

Petition for specific performance of parol partition of land is defective if possession of several cotenants as to portion allotted to each is not alleged to have been of that exclusive character which demands conclusion that parties took possession of their respective allotments with intent to give effect to parol division. 146/819 (92 S. E. 632).

Payment: Where vendor, after entering into parol contract of sale and placing in possession the vendee, who makes valuable improvements, sells the land to another having knowledge of the prior contract, equity will compel specific performance against such other, upon the original purchaser's paying or tendering the purchase money. 141/478 (2) (81 S. E. 210).

Where, subsequently to execution of

bond for title to convey, upon condition stated, several described tracts of land, owner of land makes parol agreement to convey two of the tracts upon payment, before due, of one of the purchase money notes and immediate payment of certain sum, agreement is enforceable, where purchaser has fully performed his part of contract by making payments in accordance with terms thereof. 147/219 (1) (93 S. E. 215).

Petition: Facts alleged here in amended petition did not create parol gift of land, such as would authorize plaintiff to have specific performance. 143/539 (85 S. E. 693).

Where suit is brought to compel specific performance of parol contract for land, and no facts are alleged to bring case within any of the exceptions to statute of frauds, petition is demurrable. 147/15 (1) (92 S. E. 531).

Petition here held to allege contract between plaintiff and a decedent, full performance of which by plaintiff would entitle him to specified interest in estate of decedent at his death. 147/50, 51 (1) (92 S. E. 872).

Allegations of contracts with decedent and after his death with his widow, and of full performance thereof, were sufficient, in contest between plaintiff and administrator of widow and the several defendants claiming under her with notice, to support action for specific performance. 147/50, 51 (3) (92 S. E. 872).

Amendment to petition setting up that Mrs. W., widow of B., while and after she was wife of B. fully recognized agreement between plaintiff and B., and that she recognized and adopted such agreement, and often admitted that land in controversy belonged to plaintiff at her death, she having agreed to give her interest to plaintiff in consideration of work and services rendered her in conduct and management of her business, was too vague and indefinite to set forth cause of action. 149/767 (1) (102 S. E. 131).

Possession: Party here, never having been in possession of land, not entitled to specific performance. 140/765 (2) (79 S. E. 852).

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Timber: Parol contract between owner of growing timber and another whereby latter was to immediately cut timber making merchantable cross-ties, owner to receive stated amount for each tie, and contract to be completed as soon as practicable, was one for sale of growing trees standing upon land, which should be in writing. 148/633 (1) (97 S. E. 671).

Verdict for amount not exceeding value of property devised in violation of terms of contract of which party sought to have specific performance, and decree in favor of making such amount a charge upon property devised, was proper application of equitable principle and holding in former decision, and court did not err in overruling motion in arrest of judgment. 148/394 (1) (96 S. E. 1006).

Will: Parol contract to devise realty is enforceable where it has been fully

performed by plaintiff. 144/467, 468 (2) (87 S. E. 472); 145/103 (88 S. E. 576).

Demurrer to petition here in suit against administrator to enforce parol contract of decedent to make will in favor of minor was properly overruled. *Id.*

Oral contract by which party agrees to make will with devise of specific property, as compensation for services rendered and to be rendered during testator's life, is valid and enforceable. 145/682 (1) (89 S. E. 749).

Parol agreement to devise described land, on consideration of certain sum of money which had been left by promisee with promisor for safe-keeping and value of certain services which promisee had rendered promisor, is enforceable at death of promisor by equitable remedy of specific performance. 147/145 (2) (93 S. E. 296).

§ 4636. (§ 4039.) Voluntary promises.

Charge: In suit for injunction and possession of lands, defendants claiming under parol gifts, not error to charge jury in language of this section. 145/195 (1) (88 S. E. 931).

Charity: As general rule promise to donate money to charitable purpose is gratuitous and unenforceable unless some consideration therefor exists. 24 App. 388 (1) (100 S. E. 784).

Consideration for promise to donate money to charitable purpose is supplied, where promisee during life of promisor, and before withdrawal of promise and in reliance thereon, expends money and incurs enforceable liabilities in furtherance of contemplated enterprise. 24 App. 388 (1) (100 S. E. 784).

Evidence, in action to enjoin administrator from selling land, did not authorize charge on theory of parol gift and improvements made on faith thereof, so as to make this section applicable. 144/318 (3) (87 S. E. 22).

On trial of action for injunction and specific performance, instituted by daughter against father, based upon alleged parol gift of land to daughter, accompanied by possession and valuable improvements, by daughter and

her husband on strength of gift, in which there was issue as to whether land was given to daughter, evidence as to amount of land owned by father at time of alleged gift and as to number of children was admissible in connection with testimony that father had in contemplation division of property among his children at death. 147/523 (1) (94 S. E. 1013).

It was not error to exclude testimony of defendant, given while testifying for himself, to effect that after time of alleged gift plaintiff's husband had cut wood off of land and defendant had continuously objected to his doing so, it appearing that plaintiff was in possession of land at time. 147/523 (2) (94 S. E. 1013).

Husband and wife: Where, by allegations of petition, wife was mere volunteer in whom husband had caused legal title to be taken to avoid operation of contract, and husband was real owner, all the parties being before the court, equity would afford a remedy by decreeing specific performance. 148/480 (3) (97 S. E. 74).

Improvements: Where in charging effect of voluntary promises and agreements and surrender of possession

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under such promises, and the making of improvements on the lands, the court uses the language "substantial improvements" instead of the expression "valuable improvements," even if an inaccuracy, it will not af-

ford ground for grant of new trial, especially where in another portion of the charge the court uses the language of the statute. 140/380 (4) (78 S. E. 928).

§ 4637. (§ 4040.) **Inadequacy of price.**

Fraud: Where consideration is so grossly inadequate as to shock conscience and to amount in itself to evidence of

fraud, equity will not enforce agreement. 148/500 (2-a) (97 S. E. 66).

§ 4638. (§ 4041.) **Ability of complainant to comply.**

Purchase price: Answer, in ejectment suit by vendor against vendee praying for accounting for amount paid by defendant on purchase price of land, set up substantial equity and was sufficient as a basis for a decree. 148/418 (2) (96 S. E. 993).

If upon accounting prayed by defendant vendee in ejectment suit by vendor it should be determined that defendant had fully paid purchase money, she would be entitled to relief prayed; if it should be determined that she had not fully paid purchase

price, she would be entitled, upon payment of balance due, to decree for portion of land to which plaintiff could execute title in conformity with his bond. 148/418 (2) (96 S. E. 993).

Title: Where agreed statement of facts, in action for specific performance of contract to buy land, showed that, of two outstanding recorded security deeds of which defendant complained, one had been paid and the other was held by plaintiff's grantor, decree for plaintiff was properly entered. 143/64 (2) (84 S. E. 123).

§ 4639. (§ 4042.) **Damages for breach.**

Damages: Where plaintiff can not have contract specifically performed, the prayer is for damages. 149/50, 52 (99 S. E. 31).

Evidence that lessees in 99-year lease of portion of telephone system, which bound lessees to furnish free service to lessors, had sold entire system and that purchasers refused to carry out the covenant, authorized submission to jury whether lessees were liable in damages in lieu of specific performance. 140/743, 744 (5) (79 S. E. 846).

Measure of damages: Where testator breached his contract to make devise of specific property as compensation for services rendered and to be rendered damages are measured by value

of property promised to be devised, and not value of plaintiff's services. 145/682, 683 (4) (89 S. E. 749).

Multifariousness: Petition is not multifarious because it asks for both specific performance of contract and damages for alleged breach thereof, prayer being in the alternative. 147/30 (1) (92 S. E. 636).

Will: Where on trial of action against devisee for specific performance of plaintiff's contract with testator of devisee, with reference to land devised, it develops that, without fault of plaintiff, but on account of defendant himself, specific performance is impossible, damages may be awarded for breach of contract. 145/682, 683 (3) (89 S. E. 749).

